82-2115

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, as Trustee under a Trust Agreement, dated March 17, 1975, and known as Trust R-1809,

Appellant,

v.

EDWARD J. ROSEWELL, County Treasurer and Ex-Officio County Collector of Cook County, Illinois; THOMAS C. HYNES, Assessor of Cook County, Illinois; and HARRY H. SEMROW and SEYMOUR ZABAN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois,

Appellees.

On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Illinois statutory remedy for protesting real estate taxes (Ill.Rev.Stat. 1979, ch. 120, pars. 673(a), 675 and 716) violates the due process clause of the Fifth Amendment to the United States Constitution since: 1. taxes paid under protest are segregated and invested by the County Collector, but successful protestors may not receive a refund of any interest earned on the deposited funds; 2. all interest earned on the deposited funds is deposited in the county treasury and used for county purposes; and, 3. the county also keeps all interest earned on funds deposited and invested where the protest is unsuccessful.

2. Whether the decision of the Supreme Court of Illinois in this case amounts to arbitrary judicial action in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

3. Whether, for the purposes of obtaining equitable relief pursuant to 42 U.S.C. §1983, the Illinois remedy was an adequate remedy at law.

4. Since the Illinois remedy has been construed to allow no pre-deprivation judicial hearing, whether, under the unqiue facts here presented, a pre-deprivation judicial hearing should be allowed under the provisions of 42 U.S.C. §1983.

LIST OF PARTIES

Appellant

Illinois has no real party in interest requirement similar to Rule 17(b) of the Federal Rules of Civil Procedure. The sole beneficiary of the Plaintiff below and the Appellant herein, a bank as land Trustee, is an Illinois limited partnership, American Plaza Associates.

Appellees

The Defendants below and the Appellees herein are (1) the Collector of Taxes (Edward J. Rosewell); (2) the Assessor (Thomas C. Hynes); and (3 & 4) the Commissioners of the Board of (Tax) Appeals (Harry H. Semrow and Seymour Zaban).

28 U.S.C. §2403(b) may be applicable to this appeal. Copies of this Jurisdictional Statement have been served upon the Hon. Neal F. Hartigan, Attorney General of the State of Illinois.

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In The

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JURISDICTIONAL STATEMENT

INTRODUCTION

Appellant, First National Bank of Evanston, Trustee (plaintiff below and hereinafter referred to as "taxpayer"), appeals from the Order entered by the Supreme Court of Illinois on November 18, 1982 (Petition for Rehearing denied on January 28, 1983) which found that the Illinois statutory procedure for contesting real estate taxes did not violate the Fifth Amendment to the United

States Constitution and further held that no equitable action pursuant to 42 U.S.C. §1983 could be maintained under the facts here presented.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 93 Ill.2d 388. The opinion of the Appellate Court of Illinois is reported at 101 Ill.App.3d 459. The opinion of the trial court judge is unreported. All opinions are reproduced in the Appendix (filed separately).

JURISDICTION

The Supreme Court of Illinois specifically held that the Illinois remedy for protesting taxes, which requires payment of the taxes under protest and investment of the protest fund, but which prohibits a successful tax protestor from receiving the interest earned on the refunded taxes, does not violate the Fifth Amendment of the United States Constitution (93 Ill.2d, at 395). That Order was entered on November 18, 1982 and taxpayers' Petition for Rehearing was denied on January 28, 1983. Taxpayer filed its Notice of Appeal with the Clerk of the Supreme Court of Illinois on February 4, 1983.

On April 20, 1983, Justice Stevens entered an Order extending the time for docketing this appeal to and including June 27, 1983.

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth and Fourteenth Amendments to the United States Constitution;

42 U.S.C. §1983 (The Civil Rights Act);

Ill.Rev.Stat., 1979, ch. 120, pars. 494, 594, 673(a), 675, 710 and 716;

Illinois Public Act 82-598 (amending Ill.Rev.Stat., ch. 120, pars. 673(a) and 675).

STATEMENT OF THE CASE

The opinion of the Appellate Court of Illinois contains a complete statement of the facts here presented. (Appendix, pp. 9-16).

This case involves a challenge by a taxpayer to the assessment of its property, an office building and garage, for the tax year 1978. Real estate tax bills were issued to taxpayer based upon an assessment of $8 million. Taxpayer sued the taxing officials and the person responsible for collecting the taxes to enjoin the collection of a portion of the taxes. Taxpayer succeeded in the trial court and has paid taxes based upon an assessment of $3.9 million. The trial court permanently enjoined the collection of $725,000 in taxes.

Taxpayer's pleading sought equitable relief in state court on state grounds and, supplementally, sought equitable relief and/or damages pursuant to 42 U.S.C. §1983.

Prior to filing its action, taxpayer exhausted its administrative remedy by appealing the assessment to the review board. At the hearing before the review board, the assessor conceded that the $8 million assessment was wrong and recommended a change in assessment to $3.4 million. The review board made no reduction whatsoever.

At the hearing before the trial court judge, the employees of the assessor's office who reviewed taxpayer's file and conceded the error to the review board testified that the correct assessment, if made pursuant to the assessor's standards and guidelines, would have been $3.4 million.

A later witness, another employee of the assessor's office, was called by the taxing officials and testified that the correct assessment was not $8 million, but $4.3 million.

During closing argument, defendants' attorney argued for an assessment of $3.9 million. The trial court judge found that the correct assessment was $3.9 million.

Taxpayer called a member of the review board as an adverse witness. That witness (Commissioner Harry H. Semrow) never testified that the $8 million assessment was correct. When shown the assessor's guidelines for the assessment of office buildings, Semrow testified that he'd never before seen the assessor's guidelines. When asked if the review board reviewed assessments using the same standards the assessor used in making assessments, Semrow testified (despite a statute requiring the assessor and board of appeals to jointly issue rules and regulations concerning the assessment of property [Ill.Rev.Stat., 1979, ch. 120, par. 494] and despite a lack of statutory authority for the review board to make an original assessment [Ill.Rev.Stat., 1979, ch. 120, par. 594]) that he did

not know what the assessor did, that the board was totally autonomous and it used its own standards. However, despite repeated questioning, Semrow would not or could not reveal those standards. Both the trial court judge and the Appellate Court of Illinois characterized Semrow's testimony as "confused".

At the close of taxpayer's case, the trial court dismissed taxpayer's action brought pursuant to 42 U.S.C. §1983, stating that taxpayer had failed to prove the taxing officials had recklessly disregarded taxpayer's federally protected rights. After the trial court judge issued his Memorandum of Decision, taxpayer moved to vacate the dismissal arguing that relief under 42 U.S.C. §1983 should have been allowed under the facts presented. That motion was denied.

The taxing officials (except the assessor) appealed the entry of the injunction and taxpayer cross-appealed the dismissal of its federal action. The Appellate Court of Illinois affirmed the entry of the injunction on state grounds and affirmed the dismissal of the federal action.

The Supreme Court of Illinois reversed the entry of the injunction, finding that the Illinois statutory remedy of payment under protest and objection to the collector's suit for judgment provided an adequate remedy and affirmed the dismissal of the federal action, stating that it should be joined with the objection seeking a refund of taxes paid under protest.

Question 1 was not presented to the trial court. However, the Supreme Court of Illinois specifically decided question 1 adversely to taxpayer. It held that the retention of earned interest on refunded protest payments in the legal remedy did not violate the due process clause of the Fifth Amendment to the United States Constitu-

tion. Thus, question 1 is properly presented for decision by this Court.

Question 2 arose by the issuance of an opinion by the Supreme Court of Illinois two months after the Notice of Appeal to this Court was filed. Taxpayer submits that the opinion in that case (*Shell Oil Co., et al. v. Dept. of Revenue, et al.*, 95 Ill.2d 541 (1983) (See Appendix, pp. 61-67) is irreconcilable with the opinion in this case and, since both cases were set for argument, argued and taken under advisement the same day, the Supreme Court of Illinois, has arbitrarily and inequitably exercised its power in deciding this case using different standards than those announced in *Shell Oil Co.* Question 2 could not have been presented to the Supreme Court of Illinois, but taxpayer is presenting it at the first opportunity. *Herndon v. Georgia*, 295 U.S. 441, 443-444, 79 L.Ed. 1530, 55 S.Ct. 794 (1934).

Because of this unique factual situation, this Court should consider question 2 (or note probable jurisdiction and remand this case to the Supreme Court of Illinois for presentation of question 2).

Questions 3 and 4 ask whether taxpayer may maintain an action under 42 U.S.C. §1983 at this time in state court under the facts here presented. Taxpayer moved to vacate the dismissal of its federal action and appealed the denial of that motion. Taxpayer has consistently maintained that it should have been granted equitable relief pursuant to 42 U.S.C. §1983 under the facts here presented. The Appellate Court of Illinois did not directly respond to the questions because it affirmed the entry of the injunction on state grounds. (It did note that taxpayer's civil rights claim was asserted as another basis for obtaining the injunction). (Appendix p. 21) The Su-

preme Court of Illinois held that any federal action should be joined with a refund claim. In doing so it necessarily rejected taxpayer's claim that it was entitled to maintain an action for equitable relief under 42 U.S.C. §1983 prior to utilizing the statutory remedy.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

INTRODUCTION

This appeal involves another situation like *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982) where the Supreme Court of Illinois has refused to give retroactive application to a procedural change which would make this appeal unnecessary. (See 455 U.S., footnote 1 at 428, footnote 3 at 428). Further, because the remedy has been amended (Ill. Public Act 82-598) and the subsequent decision of the Supreme Court of Illinois in *Shell Oil Co., et al. v. Dept. of Revenue, et al.*, 95 Ill.2d 541 (1983) (See Appendix pp. 61-67) makes it unlikely that this issue will recur, "this is a case of little importance except to the litigants." (Concurrence of Justice Powell in *Logan*, 455 U.S., at 443).

However, like *Logan*, this case must be decided by this Court because the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution apply to all persons and the decision of the Supreme Court of Illinois is clearly erroneous.

This Court should decide this case to make it clear that the United States Constitution and federal law, not

merely the "equitable principles" announced in *Shell Oil Co.*, apply to litigation in the State of Illinois.

This Court might well ask: "Why is this appeal being pursued? Why doesn't this taxpayer follow the legal remedy (of paying the taxes under protest and objecting to the collector's suit for judgment) which was declared to be adequate? *Nugent v. Toman*, 372 Ill. 170, 173-174, 23 N.E.2d 43 (1939) seems to allow the filing of a late objection and thus provide a remedy."

In *Midcontinental Realty Corporation v. Korzen*, 40 Ill.App.3d 133, 351 N.E.2d 376 (1976) the trial court entered an injunction against the collection of taxes. The Appellate Court of Illinois reversed—finding that the remedy at law was adequate. In responding to the Petition for Rehearing, the Appellate Court of Illinois noted:

> "Plaintiff having failed to follow the procedure set forth in sections 194 and 235 of the Revenue Act of 1939, there is no basis upon which the Circuit Court of Cook County—either in law or equity—at this time could timely consider the allegations . . ." (351 N.E. 2d at 385-386) *Cf. Clarendon Associates v. Korzen*, 56 Ill.2d 95, 306 N.E.2d 299 (1973), separate opinion of Underwood, J., concurring in part and dissenting in part, at 306 N.E.2d 304.

Thus, it is far from clear that the "adequate" legal remedy is now available so that taxpayer may obtain a hearing on its claims which both the trial court and Appellate Court of Illinois found meritorious.*

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* When Justice Stevens entered the Order extending the time for docketing this appeal, taxpayer and the taxing officials were exploring the possibility of settling this case. However, since the entry of the Order, the taxing officials have exhibited no interest in settling this case and their attorney refuses to concede that taxpayer may now pay the taxes and receive a hearing on its state and federal claims.

I.

THE ILLINOIS REMEDY, AS IT EXISTED WHEN TAXPAYER FILED THIS ACTION TO PROHIBIT THE COLLECTOR FROM UTILIZING IT, WAS UNCONSTITUTIONAL.

The normal way assessments and, thereby, taxes are contested in Cook County, Illinois is the filing of an Answer (an "objection") when the collector files his annual *in rem* Complaint (an "application") to obtain a judgment that the amount of taxes listed in his books for that year is the correct amount. If the taxes are unpaid, a deficiency judgment is entered and the property is ordered sold to satisfy the judgment. If the assessment has been appealed to the board of appeals, the taxes have been paid in full and an objection is filed before a default judgment is ordered, the Court proceeds to determine the correct amount of taxes. If judgment is entered for less than the amount of taxes paid to the collector, he is ordered to refund the taxes overpaid. (Ill.Rev.Stat., 1979, ch. 120, pars. 675 and 716).

However, in order to contest the action brought by the collector, the taxes must be paid under protest. The statutes in effect at the time this action was brought required the collector to set aside one half of one per cent of the total taxes paid (in Cook County about $2.3 billion per year) or the amount paid under protest (whichever is less) to provide a fund from which the future refunds could be made as the objections were determined. (Ill.Rev.Stat., 1979, ch. 120, par. 675) By statute, this commingled fund was required to be invested by the collector and all interest earned upon the fund placed in the county treasury. (Ill.Rev.Stat., 1979, ch. 120, par. 673a). A successful taxpayer was unable to receive any of

this interest earned on the commingled funds.* *Clarendon Associates v. Korzen*, 56 Ill.2d 101, 306 N.E.2d 299 (1973).

Under Illinois law, equity may enjoin the collection of a tax and, thereby the collector's suit against the property, where that legal remedy is not adequate. *Hoyne Savings & Loan v. Hare*, 60 Ill.2d 84, 322 N.E.2d 833 (1974). If following a statutory remedy would result in an unconstitutional deprivation, the remedy is inadequate and equity may assume jurisdiction. *Doe v. Jones*, 327 Ill. 387, 158 N.E. 793, 55 A.L.R. 303 (1927).

Taxpayer argued that following the statutory remedy would result in the collector refunding to taxpayer its portion of the fund, but confiscating any interest earned on its portion of the fund.

Taxpayer asserted that the statutory scheme whereby a successful protestor would be deprived of the interest earned on the taxes refunded to it was a denial of due process in violation of the Fifth Amendment to the United States Constitution and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 66 L.Ed.2d 358, 101 S.Ct. 446 (1980) was dispositive of the issue. However, the Supreme Court of Illinois distinguished *Webb's* on two grounds.

First, the Supreme Court of Illinois found that, unlike this case, *Webb's* involved only private funds. However, in *Shell Oil Co., supra*, this same Supreme Court of Illinois found that protested sales tax funds are not public funds,

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* Effective January 1, 1982, Ill. Public Act 82-598 allows successful protestors to recover their pro-rata share of interest earned on the protested funds. (See Appendix, pp. 101-106)

thus quickly abandoning this ground of distinction. It stated in *Shell Oil Co.* that the successful taxpayer was:

> "simply seeking the income earned from money it was determined it had no legal duty to pay as taxes. The interest income, as it accrued, belonged neither to the State nor to the county for whose benefit the taxes were collected. The Treasurer's authority, as Trustee, to invest these funds did not effect the ownership of the funds or entitle him to keep the interest so earned." (Appendix p. 64).

It further stated in *Shell Oil Co.*:

> "At no time did the protest fund become the property of the State. The Treasurer acted merely as a trustee of the protest fund (see Ill.Rev.Stat. 1979, ch. 127, par. 172) and, as such, he is not entitled to any income or fee for his services absent statutory authorization. (See Ill.Rev.Stat. 1979, ch. 24, par. 8-11-1). The protest action was instituted simply to determine whether the county or the taxpayer was entitled to the funds paid under protest. As previously mentioned, the interest income never belonged to the State. The Treasurer could not deny the taxpayer the right to that income by transferring it to the State's general revenue fund." (Appendix, p. 65).

Second, the Supreme Court of Illinois distinguished this case from *Webb's* by treating the retention of 100% of the earned interest as an implied *in lieu* fee for the service rendered-administration of the fund. This Court had stated in *Webb's*:

> "We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders." (449 U.S. 165).

The Supreme Court of Illinois overlooked the fact that in this case the county receives another return for services rendered in connection with the remedy of payment under protest. By statute, the county is allowed to keep 100% of the interest earned on unsuccessfully protested funds. It is estimated that Cook County has received $9-10 million per year from this source.

Since both distinctions made by the Supreme Court of Illinois are invalid, *Webb's* is controlling and the statutory system, as it existed when taxpayer filed its action, violated the due process clause of the Fifth Amendment to the United States Constitution.

Moreover, in this case, the "fee" equals 100 per cent of the interest earned. Such a confiscatory fee amounts to a penalty or forfeiture in violation of the due process clause of the Fifth Amendment to the United States Constitution, *Dane v. Jackson*, 256 U.S. 589, 599, 65 L.Ed. 1107, 41 S.Ct. 566 (1921). What benefit is conferred on a successful protestor which would allow confiscation of *all* of the interest earned as a matter of course?

II.

THE DECISION OF THE SUPREME COURT OF ILLINOIS AMOUNTS TO ARBITRARY JUDICIAL ACTION IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This case and *Shell Oil Co., supra*, were both set for argument and argued on September 17, 1982. *Shell Oil Co.* was taken under advisement on that date as Agenda No. 29. This case was taken under advisement immediately thereafter as Agenda No. 30. Attorneys for tax-

payers in both cases argued that *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 66 L.Ed.2d 464, 101 S.Ct. 1221 (1980) was controlling.

In this case, the Supreme Court of Illinois viewed the conversion of accrued interest as not constitutionally prohibited; found that a successful tax protestor could not receive a refund with interest in the absence of statutory authorization; found the legal remedy otherwise adequate; and, found that taxpayer was wrongfully granted an injunction on equitable grounds.

In *Shell Oil Co.*, the Supreme Court of Illinois found that accrued interest could not be retained—even in the absence of statutory authorization to pay the interest to the successful protestor; found that "equitable considerations" would govern, while liberally paraphrasing this Court's statements in *Webb's*; and, affirmed the entry of an injunction.

Neither case makes mention of the other. While the cases are contradictory and irreconcilable, no dissents were filed in either case. Cases found to be controlling on issues of state law in this case (*Lakefront Realty Corp. v. Lorenz*, 19 Ill.2d 415, 167 N.E.2d 236 [1960] and *Clarendon Associates v. Korzen*, 56 Ill.2d 101, 306 N.E.2d 299 [1973]) are either abandoned or distinguished (*Lakefront*) or ignored completely (*Clarendon*) in *Shell Oil Co.* Taxpayer's Petition for Rehearing in this case (Appendix, pp. 55-60) is denied, but arguments made in taxpayer's Briefs and that Petition for Rehearing are adopted in *Shell Oil Co.* Illinois Public Act 82-598, which now allows refunds with interest to successful tax protestors, is found to be no indication in this case that the remedy was previously inadequate; yet, that amendment is cited at length and with apparent approval in *Shell Oil Co.* (See Appendix, pp. 63-66)

This Court has held that the due process clause applies to judicial proceedings (*Ownbey v. Morgan*, 256 U.S. 94, 111, 65 L.Ed. 837, 41 S.Ct. 433 (1920)) and has held that gross and obvious judicial error coming close to the boundary of arbitrary action may constitute a taking of property without due process. *Roberts v. New York City*, 295 U.S. 264, 277, 79 L.Ed. 1429, 55 S.Ct. 689 (1934).

The issue presented in this appeal is whether two cases involving the same legal issues, which are argued the same day and taken under advisement at the same time, should be decided using the same legal standards.

This taxpayer, because of the timing of the release of the opinions in this case and *Shell Oil Co.*, has been deprived of an opportunity to have its appeal heard and decided on the basis of Illinois law as altered by the *Shell Oil Co.* case.

Taxpayer does not believe that this Court has ever considered this precise issue which involves the due process and equal protection clauses. However, taxpayer has no doubt that this Court would find a constitutional violation if this issue was considered. Cf. The concurrence of Justice Frankfurter in *Snowden v. Hughes*, 321 U.S. 1, 16, 88 L.Ed. 497, 64 S.Ct. 397 (1944).

III.

SINCE THE ILLINOIS STATUTORY REMEDY COULD NOT FULLY COMPENSATE TAXPAYER, THE REMEDY WAS NOT AN ADEQUATE REMEDY AT LAW WHICH WOULD FORECLOSE EQUITABLE JURISDICTION UNDER 42 U.S.C. §1983.

The Supreme Court of Illinois held, as a matter of *state* law, that taxpayer had an adequate remedy at law and, therefore, state equitable jurisdiction was lacking.

The Supreme Court of Illinois further held that any action under 42 U.S.C. §1983 should be joined with the

post-deprivation refund action and that equitable relief pursuant to that statute was similarly precluded.

Since 42 U.S.C. §1983 expressly allows an action in equity, a *federal* question is presented as to whether, for the purposes of construing 42 U.S.C. §1983, the Illinois remedy at law was an adequate remedy and the decision of the Supreme Court of Illinois that the Illinois remedy was "adequate" is not binding upon this Court.

Taxpayer submits that such a remedy is not an adequate remedy at law which would preclude equitable jurisdiction under 42 U.S.C. §1983 in state court since full compensation, including the earned interest, could not be awarded.

The Supreme Court of Illinois held that this Court had found the remedy "plain, speedy and efficient" under the Tax Injunction Act (28 U.S.C. §1341) in *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 67 L.Ed.2d 464, 101 S.Ct. 1221 (1981) and, thus, further discussion of the issue was precluded. But, footnote 36 of the *Rosewell* opinion (450 U.S., at 528) reveals that this Court believed that interest would have to be appropriated to pay claims if the Illinois remedy was found to be inadequate. This Court was obviously concerned with the provisions of the Eleventh Amendment to the United States Constitution in ruling the way it did in *Rosewell*. The opinion of the Supreme Court of Illinois in *Shell Oil Co.* makes it clear that the Eleventh Amendment of the United States Constitution is not involved here. (See Appendix, pp. 63-64)

Since the interest is earned, but converted by operation of law under the Illinois statutory system, *Rosewell* is not dispositive of taxpayer's claim since it did not consider this issue.

In this case, if the legal remedy had been followed, the interest would have been earned and distributed to the county. Taxpayer could not have been *fully* compensated by following the post-deprivation remedy provided by the Illinois statutes. See *Matthews v. Eldridge*, 424 U.S. 319, 331, 47 L.Ed.2d 18, 31, 96 S.Ct. 893, 900-901 (1976).

For the purposes of determining whether equitable relief was available pursuant to 42 U.S.C. §1983, this Court should adopt the reasoning of the Supreme Court of Illinois as stated in *Shell Oil Co.* and find that the Illinois statutory remedy was not an adequate remedy at law.

In changing the law, in response to the opinion in *Rosewell* and, particularly, in response to the reluctant concurrence of Justice Blackmun, the General Assembly of the State of Illinois felt that the legal remedy, as it existed when this suit was filed, was "unconscionable." (Appendix, pp. 87-88).

IV.

SINCE THE ILLINOIS REMEDY HAS BEEN CONSTRUED TO ALLOW NO PRE-DEPRIVATION JUDICIAL HEARING, UNDER THE UNIQUE FACTS HERE PRESENTED, A PRE-DEPRIVATION JUDICIAL HEARING SHOULD BE ALLOWED PURSUANT TO 42 U.S.C. §1983.

The Supreme Court of Illinois held that since this taxpayer had an adequate judicial remedy at law (a post-deprivation hearing), no judicial equitable relief (a pre-deprivation hearing) was allowable. It so held despite the unusual facts presented in this case where the assessor who made the $8 million assessment had confessed an error of $4.6 million in that assessment.

The narrow issue here presented is whether a post-deprivation state legal remedy (even if "adequate") must be utilized in all cases where an illegal or excessive assessment is claimed or whether claims brought pursuant to 42 U.S.C. §1983 may be maintained in state court as a pre-deprivation judicial remedy where, as here, prior to the deprivation a massive error is confessed by the assessor which is not corrected by the reviewing board.

The Supreme Court of Illinois has ruled that whatever the factual situation involved in the assessment of a tax, a post-deprivation judicial hearing is the *only* remedy allowed except where the property is exempt or the tax is unauthorized by law (which has been construed to mean the assessor has no *power* to make the assessment. *North Pier Terminal v. Tully*, 62 Ill.2d 540, 343 N.E.2d 507 [1976]).*

This Court has held that the Tax Injunction Act (28 U.S.C. §1341) precludes a federal court from exercising its equitable power under 42 U.S.C. §1983 in state tax cases where the state provides a "plain, speedy and *efficient*" remedy (including equity jurisdiction in state court). *Rosewell v. LaSalle National Bank*, 450 U.S. 503,

* The opinion of the Supreme Court of Illinois in this case hints that equity jurisdiction would exist where no notice is given to the taxpayer and the taxpayer would not know what amount of tax he is called upon to pay prior to receiving the bill, citing *Hoyne Savings & Loan v. Hare*, 60 Ill.2d 84, 322 N.E.2d 833 (1974). However, the exception is illusory since four years after its decision in *Hoyne*, the Supreme Court of Illinois held in *Inolex v. Rosewell*, 72 Ill.2d 998, 380 N.E.2d 775 (1978) that no equitable jurisdiction existed despite the fact that the taxpayer had not been notified of his assessment prior to receiving the bill. (See further *Inolex v. Rosewell*, 50 Ill.App.3d 600, 602, 365 N.E.2d 1219, 1293 [1977]).

footnote 7 at 508, 67 L.Ed.2d 464, 471, 101 S.Ct. 1221, 1227 (1981). This Court has also held administrative remedies must be exhausted (as they were here) before state tax claims may be litigated. *First National Bank of Greeley v. Board of Commissioners of Weld County*, 264 U.S. 450, 453, 68 L.Ed. 784, 44 S.Ct. 385 (1924). (*But see Patsy v. Florida Board of Regents*, ... U.S. ....., 73 L.Ed.2d 172, 102 S.Ct. 2557 (1982) where this Court held that exhaustion is not a prerequisite to the filing of an action under 42 U.S.C. §1983).

This Court has further held that 42 U.S.C. §1983 provides a federal remedy which is supplemental to any state remedy which gives relief and the state remedy need not be first sought and refused before the federal one is invoked. *Board of Regents v. Tomiano*, 446 U.S. 478, 64 L.Ed.2d 440, 100 S.Ct. 1790 (1980); *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961).

Therefore, taxpayer asks: Why isn't a pre-deprivation action in state court pursuant to 42 U.S.C. §1983 permissible under the unique facts of this case? Why is this taxpayer forced into a post-deprivation hearing on its claims?

The Supreme Court of Illinois has raised the spectre of massive non-payment of taxes if, in cases such as this one, equity jurisdiction is allowed. The reasoning of the Supreme Court of Illinois has always been that assessment officials are presumed to have done their job properly, the taxes are presumed to be correct and, therefore, the orderly functioning of state government allows a deprivation (the payment of the tax) before the judicial hearing on the propriety of the tax may be held.

This Court historically has shared the same concern. The regular collection of taxes is necessary to keep state government functioning in an orderly manner. (See *Rose-*

well v. LaSalle National Bank, 450 U.S. 503, 67 L.Ed.2d 464, 101 S.Ct. 1221 (1981); *Fair Assessment in Real Estate Assoc. v. McNary*, 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981); and, *California v. Grace Brethren Church*, ... U.S ....., 72 L.Ed.2d 93, 102 S.Ct. 2498 (1982).)

This Court has stated that taxpayers must use state court remedies to protect their federal rights (*Fair Assessment*, 454 U.S., at 116). However, this Court has not held that relief pursuant to 42 U.S.C. §1983 is not an available supplemental remedy in state court.

In deciding whether a post-deprivation remedy may be allowed, this Court, in cases decided since *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), has focused on whether: 1. there is a necessity for quick action by the State (this is sometimes referred to as an important governmental or general public interest in need of protection. 407 U.S., at 91); and 2. it is impracticable to hold a pre-deprivation hearing. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436-437, 71 L.Ed.2d 265, 278-279, 102 S.Ct. 1148, 1158 (1982).

In the present case, prior to the issuance of any tax bills, the assessor had confessed a $4.6 million error in the $8 million assessment of taxpayer's property. In such a case there is no presumption that the tax is correct and there is no necessity for quick action to collect the tax.*

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* The Illinois statutory remedy provides that when the tax is collected, but it is protested, the collector segregates and does not distribute funds. Therefore, government is not really funded (except the county which receives the interest earned on the protested funds which are due either the various taxing bodies or the taxpayer, not the county) when taxes are paid under protest. (Ill.Rev.Stat., 1979, ch. 120, pars. 673(a) and 675)

Moreover, it is not impractical to have a court hold a hearing on the validity of the tax prior to its collection under these circumstances.

The county taxing officials, in responding to this Jurisdictional Statement, will undoubtedly argue that taxpayer has already had two pre-deprivation hearings—before the assessor and before the board of appeals. However, taxpayer states that post-deprivation hearings are permissible only where the deprivation is based upon reliable pre-deprivation findings. In other words, what is the risk of an erroneous deprivation despite the pre-deprivation hearing and what is the probable value of additional safeguards? *Matthews v. Eldridge*, 424 U.S. 319, 343-347, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).

In the present case, the assessor, the person who made the assessment, confessed error in the hearing he gave. The board of appeals, despite the assessor's confession of error, despite a statute that required it and the assessor to jointly make rules and regulations for the assessment of property (Ill.Rev.Stat., 1979, ch. 120, par. 494), and despite a lack of statutory authority to make an original assessment (Ill.Rev.Stat., 1979, ch. 120, par. 594), felt it was totally autonomous and, at its hearings, could use its own standards—which it declined to reveal. When shown the assessor's guidelines for assessing office buildings, a member of the board of appeals who had been on the board for the previous ten years testified that he'd never seen the guidelines before. (Record on Appeal, R-82) The Appellate Court of Illinois found that the hearing before the board of appeals was so arbitrary that it was a violation of due process.

The unique facts in this case demonstrate there is a great risk of erroneous deprivation (the trial court en-

joined the collection of nearly $725,000 in taxes) and the pre-deprivation "hearings" before the assessor and board of appeals are based upon unreliable pre-deprivation findings. An additional, pre-deprivation hearing was a necessity to prevent a due process violation.

The trial court judge in this action granted an injunction on state equitable grounds, but dismissed taxpayer's Count II seeking equitable relief and/or damages under 42 U.S.C. §1983. In doing so it found that the taxing officials had not recklessly disregarded the federally protected rights of the taxpayer. Taxpayer has consistently argued that in doing so the trial court applied a standard (objective good faith) applicable to damage awards and that only a threatened imminent deprivation of a federally protected right by the taxing officials need be shown to obtain equitable relief under 42 U.S.C. §1983.

This Court apparently has never ruled upon this question (*Harlow v. Fitzgerald*, ... U.S. ....., 73 L.Ed.2d 396, footnote 34 at 411, 102 S.Ct. 2727, 2739 [1982]), but other federal courts have ruled that a presently existing actual threat to federally protected rights may be enjoined. *Raitport v. Provident Nat. Bank*, 451 F.Supp. 522 (D.C. Pa. 1978); *Hosey v. Club Van Cortlandt*, 299 F.Supp. 501 (D.C. N.Y. 1960).

In this case the collector's suit against taxpayer's property to obtain a judgment and order of sale of the property was imminent. (Ill.Rev.Stat., 1979, ch. 120, par. 710). In addition to the forfeiture of earned interest, if the legal remedy was followed, collection of the tax would have violated taxpayer's clearly established federally protected rights to:

1. Not receive a discriminatorily high assessment or tax. This right arises under the equal protection

clause of the Fourteenth Amendment to the United States Constitution. *Raymond v. Chicago Traction Co.*, 207 U.S. 20, 38, 52 L.Ed. 78, 28 S.Ct. 7 (1907); *Cumberland Coal Co. v. Board*, 284 U.S. 23, 28-29, 76 L.Ed. 146, 52 S.Ct. 48 (1931);

2. Have its claims reviewed by the board of appeals using the same standards the assessor uses in making assessments. This right also arises under the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Green v. Louis. and Interurban R.R. Co.*, 244 U.S. 499, 514, 61 L.Ed. 1260, 37 S.Ct. 48 (1916); *Raymond v. Chicago Traction Co.*, 207 U.S. 20, 38, 52 L.Ed. 78, 28 S.Ct. 7 (1908); and
3. Have its claims reviewed by the board of appeals using ascertainable standards. This right arises under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and includes the right to know the claims of the opposing party and to meet them. *Morgan v. U.S.*, 304 U.S. 1, 17-22, 82 L.Ed. 1129, 58 S.Ct. 773 (1937). In the present case, the assessor, taxpayer's supposed opposing party, had conceded error before the board of appeals in the assessment of taxpayer's property and, under Illinois law, the board of appeals merely reviews assessments. It has no statutory authority to make an assessment on its own. (Ill.Rev.Stat., 1981, ch. 120, par. 594)

Under the facts here presented, equitable pre-deprivation relief pursuant to 42 U.S.C. §1983 should have been granted.

CONCLUSION

In *Rosewell*, this Court narrowly approved the Illinois remedy and taxpayer believes this Court would have reached a different conclusion had it known that the collector (a mere stakeholder in the process) was investing protested tax payments and converting the interest for the benefit of the county.

Moreover, this Court has virtually removed the assessment of state taxes from federal scrutiny. (*Rosewell, supra*; *Fair Assessment, supra*; and, *Grace Brethren Church, supra.*)

Finally, by applying the principles of collateral estoppel and *res judicata* to actions brought pursuant to 42 U.S.C. §1983 (*Allen v. McCurry*, 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411 [1980]; *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883 [1982]), this Court has created a situation where it must ensure that state taxpayers receive a "fair shake" on their federal claims by a full and fair hearing in state courts.

The questions presented by this appeal are so substantial they merit plenary consideration by this Court. Probable jurisdiction should be noted.

In the event this Court feels it has no jurisdiction of this case by appeal, taxpayer requests that this Jurisdictional

Statement and supporting papers be considered as a Petition for a Writ of Certiorari.

Respectfully submitted,

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Attorney for Appellant
(Admitted July 25, 1974)

Date: June 24, 1983

No. 82-2115

In The

Supreme Court of the United States

October Term, 1982

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, as Trustee under a Trust Agreement, dated March 17, 1975, and known as Trust R-1809,

Appellant,

v.

EDWARD J. ROSEWELL, County Treasurer and Ex-Officio County Collector of Cook County, Illinois; THOMAS C. HYNES, Assessor of Cook County, Illinois; and HARRY H. SEMROW and SEYMOUR ZABAN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois,

Appellees.

On Appeal From The Supreme Court Of Illinois

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX 1

[November 18, 1982]
IN THE SUPREME COURT OF ILLINOIS

Docket No. 55931—Agenda 30—September 1982.

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, Trustee, Appellee, v. EDWARD J. ROSEWELL, County Treasurer, *et al.*, Appellants.

JUSTICE UNDERWOOD delivered the opinion of the court:

Plaintiff, the First National Bank and Trust Company of Evanston, as trustee, brought this action in the Cook County circuit court against County Treasurer Edward J. Rosewell seeking to enjoin the collection of 1978 real estate taxes upon the trust property. Also joined as defendants were the then members of the county board of tax appeals, Harry H. Semrow and Seymour Zaban, against whom a claim for damages under 42 U.S.C. section 1983 (1976) was asserted. The circuit court dismissed the damage action but reduced the assessed valuation of the real estate from $8 million to $3.9 million. The appellate court affirmed (101 Ill. App. 3d 459), and we granted the defendants' petition for leave to appeal.

Plaintiff holds title to certain Evanston real property in trust for American Plaza Associates (hereafter taxpayer), a limited partnership having as its principal asset the 18-story building on the trust property. In mid-1978 when the building was new and still only partially rented, the Cook County assessor notified the taxpayer that the property's assessed value had increased from the 1977 level of $2 million, which was established when the building was under construction, to $8 million. Because the assessment rate was 40%, this indicated that the assessor regarded the building's fair cash market value as approximately $20 million. The taxpayer

then sought to persuade the assessor to decrease the assessment, arguing that the assessor usually used an income-capitalization approach when valuing newly constructed buildings and that the taxpayer's building did not produce sufficient income to justify an $8 million assessment. The assessor agreed to a reduction which the taxpayer considered unsatisfactory; accordingly, it submitted further information to the assessor in early November. After reviewing the new financial data, the assessor notified the taxpayer that a new assessed value of $3.4 million had been calculated. The Evanston tax rolls for 1978, however, had been certified to the board of appeals before the assessor substituted the new figure. Once certified, the assessor can no longer change assessments. See Ill. Rev. Stat. 1977, ch. 120, par. 603.

Consequently, and pursuant to section 113 of the Revenue Act of 1939 (Ill. Rev. Stat. 1977, ch. 120, par. 594(1)), the taxpayer then filed a complaint with the board of appeals. The assessor thereafter submitted a recommendation to the board suggesting that the assessment be lowered to $3 million and that the property be reassessed in 1979. The taxpayer's petition to the board, however, included information that the construction cost of the building was approximately $17 million. Additionally, it is undisputed that the property had been mortgaged for some $20 million, and that objections were sustained to a May 1977 letter from a deceased general partner to a major tenant referring to the latter's $25 million offer for the property, and the mortgagee's "intense interest" in purchasing at a $30-32 million figure. Although the board requested an audited financial statement for calendar 1978, it was informed that the taxpayer was audited on a fiscal-year basis, and that an audited calendar-year statement was unavailable. The taxpayer did, however, submit a financial report prepared by an accounting firm. Commissioner Semrow testified that the board, upon considering the conflicting evidence of value, had determined that the taxpayer's evidence was insufficient to justify the conclusion that the certified assessment was incorrect; consequently, the board declined to decrease the assessment.

Instead of pursuing the payment-under-protest tax-objection remedy provided by the statute (Ill. Rev. Stat. 1977, ch. 120, par. 675) the taxpayer paid only $516,000, representing that portion of the taxes it considered fair, and filed its three-count equitable action. Count I alleged that the board of appeal's decision was constructively fraudulent and constituted a denial of equal protection under both the Federal and State constitutions. It sought an injunction against the collection of any further taxes for 1978. The taxpayer also alleged that it would have to borrow the amount of any unpaid taxes and that requiring it to pay interest on that sum, and to forgo interest in the event that a refund was forthcoming, rendered the legal remedy of payment under protest inadequate. Count II alleged that the decision of commissioners Semrow and Zaban had infringed upon the taxpayer's equal protection rights in violation of 42 U.S.C. sections 1981 and 1983 (1976) and sought both an injunction against any further collection and $100,000 in damages from these two defendants. Count III sought a writ of *certiorari* to the board of appeals, asserting that this was the only way by which the taxpayer could obtain judicial review.

Because we consider the tax-objection route to be an adequate legal remedy in this case, it is unnecessary to consider whether the board of appeal's decision constituted constructive fraud which violated the taxpayer's constitutional rights. This court has consistently held that independent grounds for equitable jurisdiction in cases involving real estate taxes exist only when an unauthorized tax is levied or when exempt property is taxed, neither of which is true here. (See, *e.g.*, *Hoyne Savings & Loan Association v. Hare* (1974), 60 Ill. 2d 84, *Clarendon Associates v. Korzen* (1973), 56 Ill. 2d 101.) In all other situations, equity will assume jurisdiction only when no adequate legal remedy is available. *Hoyne Savings & Loan Association v. Hare* (1974), 60 Ill. 2d 84, *La Salle National Bank v. County of Cook* (1974), 57 Ill. 2d 318; *Clarendon Associates v. Korzen* (1973), 56 Ill. 2d 101; *White v. City of Ottawa* (1925), 318 Ill. 463.

The facts of this case are readily distinguishable from the circumstances which led to the granting of equitable relief in *Hoyne Savings & Loan Association v. Hare* (1974), 60 Ill. 2d 84, upon which plaintiffs rely. Unlike the unusual situation in *Hoyne*, where the 1971 and 1972 assessments were predicated upon nonexistent improvements, the increased assessment in this case followed very substantial improvement in the property. While the plaintiff in *Hoyne* was unaware of the 1971 increased assessment until after the tax rolls had closed, the taxpayer in this case received notice of the 1978 increase long before the assessments were certified. Although equitable intervention was approved as to the 1971 assessment in *Hoyne*, this court held that equitable relief was inappropriate as to the 1972 assessment because the plaintiff knew of the increase long before the 1972 tax bills became due and simply "elected not to pursue the remedy provided by statute." (60 Ill. 2d 84, 91.) The same can be said of the taxpayer in this case.

It is argued that the payment-under-protest tax-objection remedy provided by section 194 of the Revenue Act of 1939 (Ill. Rev. Stat. 1977, ch. 120, par. 675) is inadequate because the taxpayer's principal asset—the property being taxed—did not generate sufficient income to pay the taxes under protest. Alternately, the taxpayer argues that it would have to borrow at high interest rates the money with which to pay. This, without more, is insufficient to render the legal remedy inadequate. Illinois law imposes joint liability, even though limited as to some, for the obligations of the partnership. (Ill. Rev. Stat. 1977, ch. 106½, par. 15(b).) Nothing in the record here indicates that they would be unable to supply the necessary funds. Indeed, Joseph Beale, one of the general partners, testified that one of the limited partners had supplied most of the funds used to pay part of the 1978 tax bill. Moreover, we agree with defendants' suggestion that, if adequacy of the tax-objection remedy turned upon whether the property

being taxed produced sufficient income to pay the protested tax, countless equitable actions might well be brought by the owners of vacant lots and other low-income properties to forestall the payment of their taxes. Such circumstances serve only to promote instability in local government finances, since property taxes are a principal source of revenue for local governments. (See Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism 53, 56, 78 (1980).) As we noted in *Clarendon*, the absence of a requirement that tax objections be accompanied by payments under protest during the depression years resulted in great numbers of people refusing to pay their taxes and filing objections, thus severely impairing the functioning of governmental units. *Clarendon Associates v. Korzen* (1973), 56 Ill. 2d 101, 106.

Nor do we find persuasive the taxpayer's argument that failure to provide interest upon refunded tax payments renders the payment-under-protest remedy inadequate. Although the General Assembly has recently amended the Revenue Act to provide for such interest payments (see Pub. Act 82-598, "An Act to amend Sections 192(a) and 194 of the 'Revenue Act of 1939', filed May 17, 1939, as amended"), that action does not indicate that the remedy was previously inadequate. Indeed, this court has specifically held that the lack of interest on refunded payments did not render the remedy inadequate. (*Clarendon Associates v. Korzen* (1973), 56 Ill. 2d 101; *Lakefront Realty Corp. v. Lorenz* (1960), 19 Ill. 2d 415.) The Supreme Court agreed with that conclusion when it recently over-turned a lower court injunction restraining tax collection. *Rosewell v. LaSalle National Bank* (1981), 450 U.S. 503, 67 L. Ed. 2d 464, 101 S. Ct. 1221.

Raised here for the first time is the taxpayer's contention that the failure to provide interest on refunds constitutes a taking in violation of the fifth amendment. In support of this argument, the taxpayer cites the recent decision in *Webb's Fabulous Pharmacies, Inc. v. Beck-*

with (1980), 449 U.S. 155, 66 L. Ed. 2d 358, 101 S. Ct. 446, in which the Supreme Court found that a Florida county clerk's failure to refund interest earned on a sum deposited with him pending resolution of an interpleader action constituted an improper taking. Unlike this case, however, *Webb's* involved only private funds, and Florida law provided a separate statutory fee as compensation for the clerk's services. Significantly, the Supreme Court carefully limited its holding to those narrow circumstances and concluded by stating: "We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders." (449 U.S. 155, 165, 66 L. Ed. 2d 358, 367, 101 S. Ct. 446, 452.) In light of the absence of any service charge in connection with the Revenue Act's remedy of payment under protest (Ill. Rev. Stat. 1977, ch. 120, par. 675), we view the retention of accrued interest as not constitutionally prohibited.

Because of our conclusion that the equitable action was improperly allowed it is unnecessary to address the merits of the taxpayer's civil rights claim in count II, which was brought in equity for the same reasons alleged in count I. We find this court's statement in *La Salle National Bank v. County of Cook* (1974), 57 Ill. 2d 318, 324, particularly apposite: "The legal remedy by way of payment under protest followed by objections to the application for judgment for delinquent taxes provides an adequate remedy at law wherein the alleged irregularities and violations of plaintiffs' constitutional rights may be litigated and, if warranted, relief granted. This court has held that it is proper to raise constitutional questions arising from alleged improper assessments in this manner. *People ex rel. Callahan v. Gulf, Mobile and Ohio R.R. Co.*, 8 Ill. 2d 66, at 69; *People ex rel. Ross v. Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 381 Ill. 58, at 61." In a similar section 1983 action, the Supreme Court found the equitable action improper and cited this court, noting: "There is no

doubt that the Illinois state-court refund procedure provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax. *LaSalle National Bank v. County of Cook*, 57 Ill. 2d 318, 324, 312 N.E. 2d 252, 255-256 (1974)." (*Rosewell v. LaSalle National Bank* (1981), 450 U.S. 503, 514, 67 L. Ed. 2d 464, 474, 101 S. Ct. 1221, 1229-30.) Accordingly, the taxpayer should have pursued its section 1983 claim in a legal action rather than in equity.

Similarly, this case does not present circumstances appropriate for issuance of a writ of *certiorari*. It has long been established in Illinois that a writ of *certiorari* may not be had when another adequate remedy is available. (*Jacobson v. Gunzburg* (1894), 150 Ill. 135; *Glennon v. Burton* (1893), 144 Ill. 551; *Goodfriend v. Board of Appeals* (1973), 18 Ill. App. 3d 412; *Barden v. Junior College District No. 520* (1971), 132 Ill. App. 2d 1038, *cert. denied* (1972), 406 U.S. 920, 32 L. Ed. 2d 120, 92 S. Ct. 1777. See *Kinsloe v. Pogue* (1904), 213 Ill. 302. See also 7 Ill. L. & Prac. *Certiorari* sec. 6 (1954).) In view of the judicial review afforded the taxpayer in the tax-objection remedy, issuance of the writ of *certiorari* was erroneous.

For the reasons stated above, that portion of the appellate court's decision affirming the trial court's injunction is reversed. Its affirmance of the dismissal of count II is affirmed. The cause is remanded to the circuit court of Cook County with directions to dismiss the complaint.

Affirmed in part and reversed in part and remanded, with directions.

APPENDIX 2

APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FOURTH DIVISION
October 22, 1981

80-1942

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, as Trustee under Trust Agreement dated March 17, 1975, and known as Trust No. R-1809,

Plaintiff-Appellee, Cross-Appellant,

vs.

EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois, and HARRY H. SEMROW and SEYMOUR ZABAN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois,

Defendants-Appellants, Cross-Appellees,

THOMAS C. HYNES, Assessor of Cook County, Illinois,

Defendant.

Appeal from the Circuit Court of Cook County.
Honorable EARL ARKISS, *Presiding.*

Mr. JUSTICE LINN delivered the opinion of the court:

Defendant, Edward Rosewell, in his position as County Collector, appeals from an order entered in the circuit court of Cook County permanently enjoining him from

collecting approximately $700,000 in 1978 real estate taxes allegedly owed by plaintiff, First National Bank and Trust Company of Evanston, the legal title holder of improved business property in Evanston. Plaintiff cross-appeals from a judgment entered in favor of defendants Harry Semrow and Seymour Zaban, in their positions as Commissioners of the Board of (Tax) Appeals, on a civil rights claim for damages and injunctive relief brought by plaintiff under 42 U.S.C. § 1983.

We affirm.

Facts

Plaintiff holds legal title to improved business property in Evanston in a land trust for a limited partnership known as American Plaza Associates (hereinafter the partnership). In October 1977, the partnership completed construction on the property of an eighteen story office building. This office building was the sole income producing asset of the partnership. Following the completion of the building, the partnership began the process of renting space in the building. By the end of 1978, the building was only partially occupied. In the middle of 1978, the partnership received notice from defendant Thomas Hynes, in his position as County Assessor, that the assessed value of the property for 1978 had been determined to be approximately $8 million. This represented a fair cash value of the property of approximately $20 million since the applicable assessment rate was 40 percent. The $8 million assessment was an increase of $6 million over the 1977 assessed value of $2 million.

After receiving the notice, the partnership filed a complaint with the assessor seeking a decrease in the 1978 assessment to $3.1 million. In its complaint, the partnership alleged that the building on the property had cost $17 million to construct and even under a replacement cost approach the $8 million assessment representing a $20 million fair cash value was excessive. The partnership pointed out that the office building was only

in its first year of operation, that it had only been partially rented, and that the estimated gross income the partnership would receive from the property in 1978 was approximately $3 million. The partnership requested that the assessor take into consideration the problem of renting the building in its first year, and requested that the assessor use primarily an income capitalization approach to determine the fair cash value of the property. This request was based on guidelines used by the assessor and known to the partnership as being applicable to income producing property. After taking certain deductions from gross income usually allowed by the assessor for determining the figure to be capitalized, the partnership contended that the fair cash value of the property based on an income capitalization approach was a little less than $8 million and the assessed value for 1978 should be $3.1 million.

After being supplied with necessary documentation, the assessor's employee in charge of handling the complaint agreed with the partnership that the income capitalization approach should be given primary consideration, but disagree with some of the figures supplied by the partnership. The employee determined that the fair cash value for the property should be set at approximately $8.5 million with an assessed value of $3.4 million. The employee, after receiving authorization, told the partnership that he would change the assessor's rolls to show an assessed value for 1978 of $3.4 million. The employee also told the partnership that this assessed value would apply for 1978 only and the property would be reassessed in 1979 when the income from the property would probably be higher.

The assessor's decision to lower the 1978 assessed value to $3.4 million was made in early November 1978. After the decision was made, it was discovered that the assessor's rolls for 1978 for Evanston had already been certified to the Board of Appeals. Once certified, assessed values can only be changed by the Board of Appeals. The assessor's employee told the partnership what had occurred and suggested that the partnership could pursue

either of two statutory methods for getting the assessment changed. The employee said that the assessor could certify a mistake to the Board (see Revenue Act §§ 113(2), 122 (Ill. Rev. Stat. 1979, ch. 120, pars. 594(2), 603)), or the partnership could file a complaint with the Board and the assessor would file a recommendation that the assessed value be changed to $3.4 million (see Revenue Act § 113(1) (Ill. Rev. Stat. 1979, ch. 120, par. 594(1)).

The partnership chose the latter course and, in late November 1978, it filed a complaint with the Board requesting a decrease in the assessment to $3.1 million. The assessor filed a recommendation that the assessed value be changed to $3.4 million. Thereafter, without explanation, the Board of Appeals, consisting of Commissioners Semrow and Zaban, dismissed the complaint and left the assessed value at $8 million.

In 1979, when the 1978 real estate taxes became due, the partnership paid approximately $600,000 in real estate taxes, the amount it would have owed if the $3.4 million assessment recommended by the assessor had been accepted by the Board. The partnership refused to pay an additional $800,000 in taxes allegedly owed based on the $8 million assessment. Instead, the partnership (through plaintiff) brought the present three count action in the circuit court of Cook County.

In Count I, the partnership sought a permanent injunction against defendant Rosewell to prevent him from collecting the additional $800,000 in taxes and any penalties or interest owed on the amount because of the partnership's failure to pay the taxes on time. The partnership alleged that the $8 million assessment was constructively fraudulent because it was almost two and one-half times the assessment determined by the assessor himself to be correct and because the Board of Appeals had failed to apply any known standards to determine that the $8 million assessment was correct. The partnership alleged that its remedy at law, to pay the taxes under protest and then file its objections in court when the Collector filed his application for judgment (see

Revenue Act §§ 194, 235 (Ill. Rev. Stat. 1979, ch. 120, pars. 675, 716)), was inadequate. The partnership pointed out that it did not have the assets to pay the additional taxes because the partnership's sole source of income was the office building and it did not have the cash on hand to pay the additional taxes since its total net income from the first year of operation was less than the amount of the taxes. The partnership admitted that it could borrow the amount necessary to pay the tax but contended it would have to pay 13.5 percent per year in interest (the prime rate at the time the complaint was filed). The partnership alleged that, on the average, it takes two years for an improper tax to be returned to a taxpayer, and thus it would cost the partnership approximately $200,000 to pursue its legal remedy since no interest is paid by the collector on amounts refunded to taxpayers. The partnership asserted that it was unreasonable to require it to pursue its legal remedy in the circumstances of this case and injunctive relief should be granted.

In Count II, the partnership sought legal and equitable relief under 42 U.S.C. § 1983. The partnership alleged that the Board's arbitrary determination to leave the assessment at $8 million denied it equal protection of the laws under the Fourteenth Amendment to the United States Constitution. The partnership sought damages of $100,000 from Commissioners Semrow and Zaban for depriving it of its constitutional right and sought an injunction against defendant Rosewell to prevent him from collecting the additional taxes.

In Count III, the partnership requested that a writ of certiorari be issued to the Board of Appeals, that the proceedings in which the Board determined that the $8 million assessment was correct be quashed, and that an injunction be issued to prevent Rosewell from collecting the additional taxes.

The defendants answered the complaint denying all of the essential allegations except that defendant Thomas Hynes, in his position as County Assessor, admitted that the $8 million assessment was incorrect and admitted

that the assessor had recommended a $3.4 million assessment. The assessor asserted, however, that upon further review of the information it had on file (some of it supplied by the partnership after the complaint was filed), the assessor believed that the proper assessed value of the property for 1978 should have been approximately $4.3 million.

The case went to trial. During plaintiff's case-in-chief various documents and testimony were presented to show that the partnership had a gross income of approximately $3 million in 1978 and that, after expenses, it did not have the cash on hand to pay the taxes. Plaintiff called various witnesses, among whom were employees of the assessor's office who had worked on plaintiff's file. These employees explained that the assessor uses three basic methods to determine the fair cash value of property: the market approach, the income capitalization approach and the replacement cost approach. The employees explained that the assessor had established various standards to be followed in determining the fair cash value of any particular piece of property and these standards were made known to persons who complained to the assessor about the assessed value of property.

It was brought out that all three methods of evaluation would be considered by the assessor with the market approach—an examination of recent sales of similar property in the same general area—being the preferred method. However, on office buildings, the market approach was admitted to be of little value because of a usual lack of recent sales of similar structures. For office buildings, the assessor looks primarily to the income capitalization approach and the replacement cost approach.

One of the employees that handled the partnership's file stated that with new office buildings, the assessor would give particular consideration to the problem of getting the building filled with tenants in the first year of operation and that the income capitalization approach would be given primary consideration, though all ap-

proaches were considered. The employees testified that after considering the partnership's file, they determined that the $3.4 million assessment was correct. One employee who had not seen the file until after it was updated following the filing of the complaint said that he would have recommended an assessed value of $4.3 million if all the information had been available in 1978. None of the employees contended that the $8 million assessment was correct.

Plaintiff called defendant Semrow under section 60 of the Civil Practice Act (Ill. Rev. Stat. 1979, ch. 110, par. 60). Semrow stated that he had been on the Board of Appeals for 10 years. The bulk of plaintiff's examination of Semrow consisted of an attempt to determine why the Board had dismissed plaintiff's complaint and left the assessed value at $8 million. He said the Board dismissed the complaint because it had not been provided sufficient evidence to reach a reasonable conclusion. He said he had been confused because he did not understand how a piece of property with a newly constructed $17 million office building on it could have a fair cash value of only $8 million. He said that he believed that plaintiff had failed to meet its burden of proof to show that the $8 million assessment was incorrect. When asked what plaintiff had to prove beyond showing that the assessor himself believed the proper assessment should be $3.4 million, Semrow failed to give any explanation. When asked what standards the Board applies in determining a proper assessment, Semrow answered it depended on the facts of the case. When asked whether Semrow, as a member of the Board, used the same standards as the assessor to determine value, Semrow answered that he did not know what the assessor did, that the Board was totally autonomous and used its own standards. When again asked what those standards were, Semrow repeated that it depended on the facts of the case. When asked whether Semrow, as a member of the Board, had used a replacement cost approach or an income capitalization approach, Semrow answered, at one point, that he considered a replacement cost approach, but, at another point, he said, "I didn't es-

tablish a cost approach, I didn't establish an income approach, I based my whole judgment on the way I answered * * * before."

At one point in the examination, Semrow claimed that he may have dismissed the complaint because, though the income statements supplied to him were verified, he had requested an audited statement and the partnership had failed to provide one. (The partnership had informed him that it would try to get one, but the complaint was dismissed before one was supplied.) However, when Semrow was asked why the audited statement was considered important, he replied that he did not remember.

Plaintiff also showed that the assessor had determined that the 1979 assessed value of plaintiff's property would be approximately $6 million.

At the conclusion of plaintiff's case-in-chief, the trial court granted a motion for judgment in favor of the defendants on Count II of the complaint, the civil rights claim, but denied the motion as to the other counts.

Defendants presented evidence to show that the property was subject to an outstanding mortgage of $20 million. Defendant also submitted into evidence a partnership letter written in 1978 which mentioned that a third party, who did not testify, had made a tentative offer to purchase the property with the building for $25 million. The court allowed this letter to be admitted as proof that an offer was made but refused to allow it as evidence to prove that the property had a market value of $25 million. No evidence was presented to show that the Board had considered the mortgage or the offer when it determined that the $8 million assessment was correct. No one ever testified to the belief that the $8 million assessment was correct, including Semrow, who simply said that he did not believe plaintiff had presented sufficient evidence to show it was incorrect.

In final argument, defendants' attorney, after contending that plaintiff had failed to show that the remedy at law was inadequate or that the $8 million assessment was constructively fraudulent, went on to argue what he

believed to be the proper assessment of the property for 1978. He presented a chart with the partnership's income figures for 1978. Based on these figures, the attorney argued that the 1978 assessed value of the property should be set by the court to be $3.9 million based on an income capitalization method.

In its final order, the trial court found that the $8 million assessment was constructively fraudulent, that plaintiff had no adequate remedy at law, and that a permanent injunction should be issued. Nevertheless, the court found that the proper assessment for 1978 should have been $3.9 million, the amount suggested by defendants' attorney. Based on this finding, the court ordered plaintiff to pay any additional tax owed based on the $3.9 million figure. The court also granted plaintiff's request for a writ of certiorari to the Board and quashed the proceedings had before the Board in which it affirmed the $8 million assessment.

Defendants Rosewell, Semrow, and Zaban appealed. Rosewell has challenged the court's issuance of an injunction, and Semrow and Zaban have challenged the court's issuance of a writ of certiorari. Defendant Hynes has not appealed. Plaintiff cross-appealed and has challenged the court's order granting defendants' motion for judgment on the civil rights claim brought under 42 U.S.C. § 1983.

OPINION

I

Defendants' Appeal

Injunctions to prevent the collection of real estate taxes are generally allowed in only three situations: (1) when the property is exempt from taxes; (2) when the tax is unauthorized by law or void; (3) when the tax, or the assessment upon which the tax is based, is fraudulent or constructively fraudulent and the remedy at law is inadequate. (*Clarendon Associates v. Korzen* (1973), 56 Ill. 2d 101, 306 N.E.2d 299.) It is the third situation which is alleged to be applicable to this case. Defendants assert that plaintiff failed to show that the remedy at law was

inadequate or that the $8 million assessment was constructively fraudulent. We hold that in the circumstances of this case the injunction to prevent the collection of the additional taxes was properly granted.

Constructive Fraud

Defendants argue that plaintiff failed to show that the $8 million assessment was constructively fraudulent. They assert that based on a replacement cost approach for determining fair cash value, the property could have been deemed to be worth $20 million in 1978. They also argue that the letter mentioning the 1978 offer to purchase the property for $25 million should have been admitted as evidence tending to show the fair cash value of the property under the market approach. Based on this, defendants claim that the property could have been deemed to be worth $20 million in 1978 under the market approach. Since either of the above approaches would give an assessed value of the property in 1978 of 18 million, defendants contend that plaintiff failed to show the $8 million assessment was excessive at all and thus failed to meet its burden to prove the assessment was constructively fraudulent.

Even assuming that the letter should have been admitted as evidence of value, defendants' argument is still unacceptable. The question here is not what standards should have been used to determine value, but whether the Board of Appeals used any standards. When plaintiff went before the Board of Appeals, it had the burden of proving the $8 million assessment was improper. Once the assessor, the official whose duty it is to determine assessed values, admitted to the Board that the $8 million assessment was incorrect and a $3.4 million assessment was correct, plaintiff had undoubtedly met its burden. Contrary to Commissioner Semrow's belief at trial, the Board could not ignore the assessor's recommendation entirely. The Board is not an autonomous body that can set its own standards for determining assessed values. Under the law, the assessor and the Board are required to act

jointly in establishing standards for determining assessed values. (Ill. Rev. Stat. 1979, ch. 120, par. 494.) Apparently, in Cook County, only the assessor has made public the standards used for determining assessed values. (See Ganz & Laswell, *Review of Real Estate Assessments—Cook County (Chicago) v. ,Remainder of Illinois*, 11 J. Mar. J. of Prac. & Proc. 16 (1977).) However, it must be assumed that these standards were adopted in accordance with the law, meaning that the assessor and the Board concurred in their adoption. Hence, the Board was bound to apply the same general standards used by the assessor.

The Board, perhaps, could have determined that the assessor should not have relied primarily on the income capitalization approach under the facts of the particular case, but the Board had to use known and existing standards before it could reject the assessor's recommendation outright. In the present case, it is obvious from Commissioner Semrow's testimony that the $8 million assessment was arbitrarily affirmed. The only understandable reason given by Semrow for affirming the assessment was that he was confused, and we believe that if a taxpayer is about to be placed in a position of owing a million dollars in real estate taxes, there should be more justification than the simple fact that a public official was confused.

It is peculiar in this case that no one at trial ever testified to the belief that the $8 million assessment was correct. Commissioner Semrow merely stated that he believed plaintiff had failed to meet its burden in proving the $8 million assessment was improper. By the conclusion of the trial, even the defendants' attorney was arguing for a $3.9 million assessment. This argument was actually adopted by the trial court.

From all of the facts in this case, it is clear that plaintiff met its burden of proving the $8 million assessment for 1978 was excessive and constructively fraudulent. The assessor admitted, from the beginning, that it was excessive. The assessor admitted that under the applicable standards the proper assessment was between $3.4 and $4.3 million. The Board of Appeals had no

known reason for affirming the $8 million assessment. The 1979 assessment has been set at only $6 million. The defendants' attorney argued that a $3.9 million assessment was proper. Obviously, the trial court was correct in finding the $8 million assessment constructively fraudulent. Cf. *People ex rel. Nordlund v. Lans* (1964), 31 Ill. 2d 477, 202 N.E.2d 543.

Adequate Remedy at Law

Defendants argue that plaintiff failed to show the remedy at law was inadequate. Citing *Clarendon Associates v. Korzen* (1973), 56 Ill. 2d 101, 306 N.E.2d 299, defendants contend that plaintiff, to prove the inadequacy of the remedy at law, had to show the remedy at law was "unavailable." Defendants contend that to do this plaintiff had to show that it was impossible for it to pay the taxes under protest and challenge the collector's application for judgment in court. Defendants argue that since the partnership admitted it could borrow the money to pay the taxes, the "unavailability" of the remedy at law was not shown. Defendants, in the alternative, contend, that even if the partnership need not have shown that it was unable to borrow the money to pay the taxes, the partnership should have been required to show that all of the partners, from their personal assets, could not have paid the taxes, and not just merely that their partnership entity did not have the funds to pay the taxes.

Though *Clarendon Associates v. Korzen* contains language to the effect that an injunction against the collection of taxes should be denied unless the taxpayer shows the remedy at law is unavailable, the language of that opinion was tempered somewhat in the subsequent opinion of *Hoyne Savings & Loan Assoc. v. Hare* (1974), 60 Ill. 2d 84, 322 N.E.2d 833. There, the supreme court held that even when a taxpayer can pay the taxes, rare cases may present themselves where it would be extremely unjust to deny an injunction and require a taxpayer to pay the taxes under protest and forego the interest on his payment. We believe the present facts present such a case.

Stripped to the basics, this case presents the following scenario. Defendants contend that plaintiff should be denied an injunction and be required to lose over $200,000 in interest by pursuing its legal remedy of paying the taxes under protest and then challenging the collector's application for judgment in court. Defendants make this contention though the assessor himself has always admitted that the $8 million assessment was excessive and that the taxpayer should pay taxed based on an assessment of $3.4 million to $4.3 million. Defendants make this contention despite their own argument that a $3.9 million assessment was proper and that the taxpayer should pay a tax based on that assessment. In essence, defendants contend that plaintiff should be required to lose over $200,000 in interest to pursue its legal remedy not because there is any possibility that plaintiff owes an additional tax based on the $8 million assessment, but merely because a member of the Board of Appeals was confused. Clearly, it would be extremely unjust to require plaintiff to pursue its legal remedy in this case. Therefore, even assuming that the partnership could have paid the taxes, we would still hold that the injunction was properly issued in this case.

II

Defendants also contend that the trial court erred in granting the writ of certiorari and quashing the proceedings had before the Board when it affirmed the $8 million assessment. In light of our decision on the constructive fraud count, we find we need not address this issue. The primary relief sought by plaintiff under Count I of its complaint, the constructive fraud count, and Count III, the writ of certiorari count, was the issuance of an injunction to prevent the collection of the additional taxes. Since we have found that the injunctive relief was properly granted under the constructive fraud count, it would be superfluous to consider whether the same relief should have been granted under the writ of certiorari count. Accordingly, we simply affirm the trial court's findings under Count III without expressing any opinion as to whether a writ of certiorari was properly granted.

III

Plaintiff's Cross-appeal

Plaintiff has cross-appealed from the judgment entered for defendants at the conclusion of plaintiff's evidence on the civil rights claim brought under 42 U.S.C. § 1983. In that claim plaintiff accused Commissioners Semrow and Zaban of violating plaintiff's right of equal protection of the laws (U.S. Const., amend. XIV) by affirming the $8 million assessment without applying any known standards of valuation. Plaintiff sought damages of $100,000 from Semrow and Zaban and an injunction against Rosewell to prevent him from collecting the additional taxes based on the $8 million assessment.

In entering judgment for defendants, the trial court found, after weighing the evidence, that plaintiff had failed to present a prima facie case against defendants.

We note that plaintiff only claimed a violation of equal protection of the laws and not a violation of due process. From the evidence at trial plaintiff presented an arguable case for violation of due process in that Semrow failed to apply any standards in affirming the $8 million assessment but there was little evidence from which a violation of equal protection could be inferred. We also note that no direct evidence was presented against Commissioner Zaban and the only evidence on damages was the damage plaintiff would suffer if it was forced to pay the additional taxes. At oral argument, plaintiff indicated that the civil rights claim was asserted primarily as another basis for obtaining the injunction and did not indicate any desire to amend its complaint or pursue the claim any further if the injunction were affirmed under the constructive fraud count. Hence, for all of these reasons, we affirm the judgment entered for defendants on the civil rights claim.

Accordingly, for the reasons noted, we affirm.

Affirmed.

Johnson and Jiganti, JJ., concur.

APPENDIX 3

State of Illinois
County of Cook

[April 22, 1980]

IN THE CIRCUIT COURT OF COOK COUNTY
LAW DIVISION—TAX DEPARTMENT

FIRST NATIONAL BANK & TRUST COMPANY OF EVANSTON, as Trustee under Trust Agreement dated March 17, 1975, and known as Trust No. R-1809,

Plaintiff,

79 CH 6357 *vs.*

EDWARD ROSEWELL, Treasurer of Cook, THOMAS HYNES, Assessor of Cook County; and HARRY SEMROW and SEYMOUR ZABAN, Commissioners of the Board of Appeals of Cook County,

Defendants.

MEMORANDUM OF DECISION

JAMES A. ROONEY,
Attorney for Plaintiff

MICHAEL BACCASH,
Asst. State's Attorney,
Attorney for Defendants

INTRODUCTION

The improved realty is located in Evanston. The building is a highrise of 18 stories with a garage for 380 parking stalls. Construction was commenced in 1976 and occupancy availability was around the first of October,

1977. The rentable areas of the building is composed as follows:

Office Space—	268,888 square feet,
Commercial—	39,891 square feet,
Storage—	9,470 square feet.

For the year 1977, the Assessor assessed the property at *$2,006,222*. For the year 1978 the taxpayer was notified that the assessment would be *$8,008,354*. A complaint accompanied by data was submitted to the Assessor's office to protest the assessment. However, during the submission time of the complaint and data, the assessment period for Evanston Township was closed. As a consequence, the 8 million dollar assessment was certified. (The taxpayer alleges that it was informed by the Assessor's office that the assessment was the result of computer error.)

On the data submitted to the Assessor, the Assessor concluded that the proper assessment should be *$3,406,363* instead of the 8 million dollars. The taxpayer was given the option by the Assessor to determine whether it wanted a certificate of error to be filed with the Board of Appeals or in the alternative a recommendation to be made as to the assessment. The taxpayer then filed its complaint with the Board of Appeals which included the Assessor's recommendation. However, the Board rejected the $3,406,363 recommendation and kept the assessment at 8 million.

The taxpayer in its first amended complaint alleges that the real estate taxes on the erroneous 8 million dollar assessment is $1,394,984.24. This is to be compared with the tax liability of $587,489.36 on the proper assessment of $3,406,363. The difference in tax liability between the two assessments is $807,494.88.

The taxpayer then alleges that "to contest the excess taxes of $807,494,.88 it will be forced to borrow money at existing interest rates since it has no funds sufficient to pay the fraudulent taxes, wait two years for a refund and receive said refund without interest." The taxpayer further alleges (at the time the complaint was drafted)

the prime interest rate charged by most banks was 13.25 percent. Interest on the disputed amount at prime for two years would cost plaintiff $213,986.14.

(This court notes that at this time, the prime rate generally is 20.00 percent and the current inflation is 18 percent.)

After the "mechanical-error" or mistake was determined and acknowledged by the Assessor, the taxpayer initially had available three statutory recourses conditioned by a time factor:

> (1) Pursuant to Section 598 of Chapter 120 of Illinois Revised Statutes, the taxpayer file a complaint with the Board of Appeals. The Board in turn forwards a copy to the Assessor.
>
> (2) Section 603 authorizes a certificate of correction to be executed by the Assessor "at any time prior to the time the Board of Appeals is required to complete its work under the provisions of Section 606." The certificate of correction is predicated upon a mistake or error other than a mistake of error of judgment. If the Board of Appeals is satisfied that a mistake or error has occurred both Commissioners shall endorse the certificate and order the Assessor to correct the mistake or error.
>
> (3) Section 604 provides that if the County Assessor shall discover an error or mistake in such assessment, such Assessor shall execute a certificate at anytime before judgment and after the Board of Appeals completes its work and the assessment books are certified. The certificate of error when properly endorsed may be received into evidence.

The necessity for the filing of a complaint however is a requisite for the exhaustion of administrative channels. In re *Application of County Treasurer of Cook County v. Piper's Alley Corporation*, 35 Ill. App.3d 449, the court said,

> "There is no inherent inconsistency between the Assessor filing a certificate of correction and the

taxpayer filing a complaint. The portions of the Revenue Act from which the Board of Appeals derives its powers and from which taxpayers and the Assessors derive their statutory rights to file valuation complaints and certificates of correction do not make them mutually exclusive procedures. A taxpayer's valuation complaint is designed to protect a property owner from excessive and unjust assessments while a certificate of correction is a procedure permitting the Assessor to petition for the correction of his own non-judgmental errors to the end that the assessment process might be more efficient and just."

Finally, the statutory remedy afforded the taxpayer are the provisions of Section 675 (Section 194 of the Act). In *Chicago Sheraton Corporation v. Zaban*, 71 Ill.2d 85, 90 the court said,

> "Under the provisions of Section 194, if the taxpayer is not satisfied with the order of the Board of Appeals, he may pay the tax under protest (Chap. 120, par. 675) and object to the Collector's application for judgment and order of sale, thus obtaining judicial review of the assessment and tax. An examination of the statutory scheme shows that the certificate of error procedure provided in Section 123 is intended to be separate and distinct from the procedure available to a taxpayer under Sections 117 and 118 [194] (filing of complaints and certificates of correction).

The recourse that the taxpayer by this litigation seeks to invoke is that the circumstances of this case create a special ground for equitable jurisdiction under the criteria established by *Clarendon Associates v. Korzen*, 56 Ill.2d 101 (1973), but tempered by Hoyne Savings & Loan Association.

The taxpayer's amended complaint posited three issues before the court predicated upon three distinct claims,

In COUNT I:

The taxpayer alleges a deprivation of constitutional rights:

> A—A violation of the equal protection clause of federal and state constitutions which resulted in "a substantially excessive and constructively fraudulent overassessment of the plaintiff's property."
>
> B—A violation of the due process provisions of the federal and state constitutions, "if it is forced to follow the inadequate state court remedy for contesting the assessment and taxes in that the taxes must be paid in full, a successful claimant must typically wait two years for a refund, and no refunds may be made with interest to a successful claimant."

The taxpayer seeks an injunction.

IN COUNT II:

> The allegations are made that the taxpayer's civil rights were violated in that the actions of Commissioners Semrow and Zaban constituted a deprivation of rights, privileges and immunities. The cause of action is premised upon Section 1983, Title 42 of the United States Code.

The taxpayer seeks an injunction and damages in the sum of $100,000.

IN COUNT III:

> The taxpayer seeks to bring forth the record of the Board of Appeals by a Writ of Certiorari and quash the proceeding of the Board.

The injunctive claims sought in Counts I and II along with the money damages is governed by separate and distinct rules from that which govern the request for the Writ of Certiorari.

The money damages and the injunctive relief of Counts I and II are governed by the rules that generally determine the admissibility of evidence and the grant of injunctive relief and damages.

Whereas, the Writ of Certiorari on its return to this court brings to this court all relevant records. This court must then determine with regard to the Board's decision whether the Board had jurisdiction and had acted in accordance with the law. This consists of only an inspection of the record of the Board's proceeding. The court cannot review questions of fact or decide them. *There can be no extrinsic evidence.*

TAXPAYER'S ARGUMENT

The taxpayer in its argument has anchored its premises upon the constitutional guarantees of a violation of equal protection and a denial of due process, in that:

1—That the Assessor and the Board failed to follow established policies and procedures in making the 1978 assessment of plaintiffs which resulted in a *constructively fraudulent overassessment.*

2—That the law remedy provided for contesting the assessment and taxes with its attendant requirement that the taxes must be paid in full with a typical two year wait for a refund with interest is a denial of due process of both the Federal and State constitutions.

Pivotal to its contention is its reliance upon *La Salle National Bank v. Rosewell et al.*, 604 F.2d 530 (1979) which is currently upon appeal to the United States Supreme Court. La Salle National Bank brought a civil rights injunction under 42 U.S.C. Sec. 1983 to enjoin the collection of excessive real estate taxes allegedly imposed in violation of the plaintiff's due process and equal protection under the Fourteenth Amendment.

The issue in the *La Salle Bank* case was posited as follows:

"The question we must answer is whether this remedy (state legal remedy) which requires prepay-

ment of the entire tax bill and refunds erroneously collected monies without interest (and allegedly with an average delay of two years) is plain, speedy and efficient."

The U. S. Court of Appeals concluded that the Illinois remedy is inadequate because,

1—Failure to pay interest on the refund,
2—Policy considerations and
3—Common sense.

The court then concluded that,

"The most succinct analysis of the inadequacy of a tax grievance procedure which requires prepayment of the entire tax and then refuses to pay interest on the funds awarded successful litigants was provided by Learned Hand over fifty years ago."

'It seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever has been our Archaic notions about interest, in modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong'.

(*Proctor & Gamble v. Sherman*, 2 F.2d 165).

ISSUES

Issues which were posited in *Clarendon Associates v. Korzen*, 56 Ill.2d 101 (1973), and in *Hoyne Savings & Loan v. Hare*, ... Ill.2d 84, have materiality to the circumstances of this litigation. In addition, the taxpayer has raised the issue of constitutional guarantees, therefore, the issues may be stated as follows:

1—Does the facts of this case create a special ground for equitable jurisdiction—namely a constructive fraudulent excessive assessment.

2—Whether there is adequate remedy at law established by Chapter 120, Sections 675 and 716 which is available to this taxpayer, which requires a refund without interest upon a successful prosecution.

3—Were the taxpayer's constitutional guarantees violated?

4—Will the writ of certiorari lie?

These issues in turn raise the overall question as whether "under these circumstances the court should interfere with the tax assessment and collection by granting injunctive relief."

COURT'S COMMENTS

In *Lakefront Realty v. Lorenz*, 19 Ill.2d 425, our Supreme Court examined and weighed the rationale with reference to the question of interest payments on refunds. It was aware that in the year 1960, there was a division of opinion among the authorities. It said,

> "Authorities elsewhere are in extreme conflict and are difficult to reconcile. Many courts have held that where the taxpayer is entitled to a refund on an excess payment of taxes, he is likewise entitled to interest on the refund as a matter of course, provided no statute or public policy mitigates against it."

The court rejected this position and then stated the basis for its conviction that interest cannot be paid.

> "The latter view (no interest) has its antecedents in the rule that interest, being a creature of statute, is recoverable only by statute, or contract, and in the practical aspects of the circumstances that a tax collector, being a mere trustee of public funds collected for specific purposes, has no money to pay interest in the absence of statutory authority to establish a fund for that purpose."

> "We are of the opinion the latter view is the only view compatible with the statutory system which provides for the appropriation, levy, collection and the disbursement of taxes in this State, and we think too, as other courts have pointed out that the silence of our refund statute on the question of interest discloses a legislative intention to deny it. Accordingly, we conclude that the plaintiff is not entitled to interest in the absence of a statute imposing that liability. This being so, the failure of the statutory remedy to provide for the recovery of interest is no measure of its adequacy or inadequacy."

The trial court is especially mindful of the Supreme Court's comments in *Clarendon* when it said,

> "This court has held in *Lakefront Realty Corp. v. Lorenz*, 19 Ill.2d 415, that under the statutory remedy provided by Sections 194 and 235 of the Revenue Act of 1939 (Ill. Rev. Stat. 1971, chapter 120 paragraphs 675 and 716) the taxpayer is not entitled to interest on the refund. This court also held in *Lakefront* that this fact does not render the remedy at law inadequate so as to justify equity in assuming jurisdiction. We see no reason to depart from that decision.
>
> If a failure to provide for the payment on a tax refund were to render the statutory remedy inadequate, then the remedy would be inadequate as to all objections to taxes whether these objections were based on constructively fraudulent assessments, excessive rate, appropriation for multiple purposes or any other of the money grounds for filing objections to taxes."

In re Application of *County Treasurer*, 42 Ill. App.3d 895 (1976), the court reaffirmed the requirement that a taxpayer shall first pay all of the tax installments due in order to object. Chapter 120 Sections 675 and 716, the court said are mandatory and not directory. The court said,

> "The Supreme Court of Illinois has repeatedly stated that the prepayment requirements of these sections is mandatory."

The Appellate Court then commented that,

> "The only exception to the prepayment requirement of Section 235 (Chapter 120 Section 675) is where the objection is that the real estate assessed is not subject to taxation."

The court further stated, "that the objector further contends that requiring it to pay all of the installments due before the filing of the objection violates constitutional rights because it deprives the objector of the use of the amount of money representing illegal tax. This argument is not persuasive because it is a common, sanctional practice to require prepayment before contesting a tax. In *Lakefront Realty Corp. v. Lorenz* (1960) 19 Ill.2d 415, the court rejected a claim that the prepayment provisions requires a taxpayer to purchase justice in contravention of Section 19 of Article II of the Illinois Constitution of 1870 (now Section 12 Article 1).

> "Every person shall find a certain remedy, * * * He shall obtain justice by law, truly, completely and promptly."
>
> Pointing out * * * 'the common practice of the land with respect to many taxes such as income taxes, with-holding tax and the like, serve greatly to refute the plaintiff's position.'

"While the court then was not addressing itself to the due process question, its reasoning is persuasive that mandatory prepayment requirement of Section 194, and 235 of the Revenue Act as amended, did not deprive objector of its constitutional right to due process of law."

ASSESSMENT OF PROPERTY

In *Consolidated Coal v. Property Tax Appeal Board*, 29 Ill. App.3d 465, 468, 470, the court said,

> "There are also well established rules for the challenge of property valuations for tax purposes. In

> Illinois, for purposes of Property Tax, both real and personal property are to be assessed according to fair cash value (Ill. Rev. Stat. 1969, Chapter 120 Sections 501, 502). This is generally interpreted to mean fair market value or the price that property would bring at a sale where both parties are willing, ready and able to do business and under no duress to do so."
>
> "Market values generally are the standard to be used in valuing property for tax purposes. It is true that there are instances where no market value can be determined, or where a market value is not truly reflective of an item's worth. In such situations, valuation methods such as *reproduction cost, less depreciation and capitalization of income* are helpful. They are not however solely determinative of valuation."
>
> "Elements such as depreciation, obsolescence and lack of market ability are properly considered in valuing property. The age of property, its life expectancy, its income production capabilities, its condition and location are all factors in valuation."

The record in this case is silent to any evidence as to market values.

The role and function of the Assessor and the Board is delineated by statute. The court decisions to some extent have succinctly summarized their status.

ASSESSOR:

The role of the Assessor in assessing realty is indeed singular. From earliest times the power of valuation of property rested exclusively with him. (*Chicago & Alton Railroad Co. v. People*, 98 Ill. 350).

There is a presumption that the determination of the Assessor as to valuation is correct because his actions were executed pursuant to the mandate of his office. Hence, this determination whether modified by certificate of correction or error *constitutes a prima facie case as to valuation.*

The court in *People v. Millar*, 307 Ill. at 562, said,

> "The assessment of property is purely statutory and in fulfilling that mandate, he is obliged to take into consideration any information he has acquired from his investigations as well as property comparisons. His charge is to form a honest judgment as to the value to be fixed. The *presumption is that the tax is just* and that the officers levying it have discharged their duty. This presumption can be overcome only by clear and explicit testimony."

The court in *Goodfriend v. Board of Appeals*, 18 Ill. App.3d 412, said,

> "The assessment of property for taxation must be made by the County Assessor or his deputy. In fact, by statute the Assessor takes an oath that this will be done. He, exclusively is vested with power to make assessments. This power imposes on the Assessor the duty that is *correlative to a right* which inheres in every person in the county: The right to be informed of the value placed on his property by the County Assessor in order that he who is aggrieved may appeal to the Board." (Citations omitted and emphasis supplied)

BOARD:

In *Goodfriend*, the court said,

> "Under the Revenue Act, * * * * the Board of Appeals had the power only to hear and * * * * correct any mistake or error (other than mistakes or errors of judgment as to valuation of any real or personal property).
>
> * * * * *
>
> "Within the scope of its administrative powers, the Board is an inferior tribunal. It has only the jurisdiction given to it by statute. It cannot make an assessment; it can only review assessments made by the County Assessor."

In their noteworthy article, Ganz and Laswell, Review of Real Estate Assessments—Cook County v. Remainder of Illinois, John Marshall Journal of Practice & Procedure, Volume 11, Fall 1977, Number 1, stated at Page 28,

> "During the course of its review, the Board of Appeals must adhere to the same percentage levels of market value as the Assessor. However, while both the Assessor and the Board of Appeals are required to make and prescribe rules and regulations for the assessment of property, only the Assessor has done so. It is noteworthy that the only rules pertaining to the Board of Appeals are those previously quoted and even these were not jointly proclaimed with the Assessor. The end result of this conspicuous absence of governing rules in a Board of Appeals proceeding is *that the taxpayer's burden of proof is unknown.*" (Emphasis supplied)
>
> * * * * *
>
> "On what then should the Board of Appeals base its decision? Should it give presumptive weight to the Assessor's decision? Should it consider only the evidence presented by the taxpayer? Should it consider its own experience and possibly ex-parte contacts."
>
> * * * * *
>
> "As has been stated the Board of Appeals has been referred to as being quasi-judicial or judicial in nature. Does this statute require the Board in conducting a hearing to comply with judicial standards?"
>
> * * * * *
>
> "The precise standards to which the conduct of the Board of Appeals must comport and remain unknown because neither the courts nor the legislature have provided any guidance as to this subject."

The guidance to proposed standards is the logical deduction to be made from the comments made by the court in *Goodfriend*, wherein it said,

> "This law calls attention to the fact that by the provisions in the Revenue Act of 1939, the legislature has vested Appellants Board of Appeals, Keane and Semrow (its members) with the power *to decide property rights of others*, a power which exercised makes their official actions *judicial*. However, when considered in relation to the Circuit Court, the Board of Appeals is an inferior tribunal."

Where property rights of a taxpayer is involved in a tribunal albeit, an inferior tribunal, the standards to be applied are judicial which in turn are predicated on the doctrine of due process. In this case, the positions of the Assessor and that of the Board of Appeals are characterized by immiscibility.

LITIGATION AT BAR

In the case at Bar—the alleged error that was committed—be it computer or otherwise—would result in an excessive, improper assessment which would be constructively fraudulent to the taxpayer. The Assessor is supportive of the taxpayer. They are both in agreement that the 8 million dollar assessment is improper. That the evidence predicated upon the application of the capitalization standard is corroborative of their premise that the assessment was improper. The parties go their separate ways as to whether the proper assessment is $3,406,363 or $4,376,659—a difference of $970,296.

John C. Mullen, Chief of the Audit Division, *based upon the data submitted to him by the taxpayer* (exhibit 7) concluded that the assessed valuation would be $3,406,363 for one year only. This was done because of the large vacancy based upon the renting factor in a brand new building. Their expense factor would be larger than normal and the revenues would be down. He testified that the normal procedure is to look at the three approaches to value "and when we come up with a recommendation, we

look at all three and decide what's a reasonable assessment." (TR 43, 46)

He further testified that,

> "Under these circumstances, the income approach would have been more relevant because of the problems with it renting up. So we would look at the income."

The formula employed was based upon the following factors: The 40% assessment category (.40% x 8,515,907 = $3,406,363) a tax equalizer of 1.4153, and a tax rate of 11.44 per $100 Dollars of assessed valuation with a capitalization rate of eleven percent. The net income that was capitalized was $1,487,208. If a capitalization of nine percent were to be used, the amount would be $1,307,410.

In the course of this litigation, the contention was made that the recommendation made by Mr. Mullen was not correct because he did not have all the data. That the information subsequently given Mr. Maurice Connors, Director of Research & Standards (whether obtained for settlement purposes or for discovery) resulted in a correct determination. The Assessor in his affirmative defense makes the following judicial admission,

> "If the Assessor has had all the evidence he now has at the time he made his initial assessment herein, and the Assessor's recommendation to the Board, the assessment and the Assessor's recommendation would have been *$4,376,659.*"

The taxpayer sought to exclude the financial report of Brook and Grisby sent to the Assessor. (The court does not regard it as a certified audit or an audit because Mr. Grisby regarded it as less than an audit report.) Nevertheless, it contains admissions. Taxpayer argues that the report was submitted for purposes of compromise and settlement of the litigation. (See plaintiff's exhibit 13.) The States Attorney maintains that a copy was forwarded to him on the basis of discovery.

The court in permitting the admission of the report stated it was admitted for a limited purpose. The limited

purpose is predicated in the distinction to be made of an offer to compromise or an actual finished compromise and *negotiations of an admitted liability.*

The offer of compromise is not admissible. Admissions of fact during the negotiation are admissible. *Domm v. Hollenbeck*, 142 Ill. App. 439 (1908). See Jones on Evidence, page 532. (This position is in marked contrast with the Federal Rule of Evidence 408, 65 F.R.D. 131, 144) In Cleary Book of Evidence (1972) cited by Cleary and Graham in the Handbook of Evidence, Third Edition, the writers point out, page 151, "statements made in connection with compromise negotiations may be sheltered by the addition of phrases of qualification such as 'without prejudice' or 'hypothetically speaking' McCormick, Evidence 99234." This was not done by the taxpayer. Cleary agrees with the position taken by Jones as to the admissibility of facts which are admitted during negotiations.

Mr. Connors in arriving at his valuations stated that he capitalized the income, but removed what he regarded as "irrelevant expenses, namely: depreciation, loan service, owner expense of interest, certain lease expense, real estate taxes and tenant improvement. Based upon the factors in capitalization he concluded that the fair cash value was $10,941,648 and using the 40 percent category, he concluded that the assessed valuation would then be $4,376,659. Mr. Connor was cross examined as to the allowable expenses permitted by the Assessor manual.

Hence, with reference to the determination of value made by the two experts from the Assessor's Office—made at different times and upon varied information—each concluded, predicated upon the capitalization method that the 8 million assessment was improper.

The financial statement (deft's exhibit 4) for the year ending December 31, 1978 indicates that the gross income of the property was $3,065,463. (The projected income by the taxpayer in data submitted to the Assessor was an adjusted net income of $1,307,661, (plaintiff's exhibit 13.) The second evaluation of the Assessor's based

upon the financial statement used a stabilized net income figure of $1,739,722.) The court accepts the figure of $3,065,463. The court is in accord with the closing argument of the State's Attorney with reference to the capitalization method and figures to be utilized. This means that the following expenses would be allowed:

Loan service commitment fee
Insurance
Lease expense
Building operation
Amortization—(capitalized lease costs)
Repairs
Legal and professional miscellaneous.

This brought the income figure to an adjusted $1,554,167.

The capitalization factor was computed as follows:

Overall rate	.09 percent
Rate of 11.524 x effective assessment of .59864 resulted in a capitalized rate attributable to taxes of,	.06898
The overall capitalization	15.9

$1,554,167 adjusted income, capitalized at 15.9, results in a fair market value of $9,775,865. With a property classification of 40 percent produces an assessed value of $3,910,346.

This is in contrast with the taxpayer's indicated market value of $8,491,305 and an assessment of $3,396,522.

As a judicial tribunal, the Board possesses the discretionary action inherent to a court. Like a court—the exercise of that discretion is bounded by rules and principles of law. Discretion is the exercise of an option promulgated on facts and the law.

Commissioner's Semrow's conclusion that,

> "We denied the R.R., because we were not provided in our opinion, evidence enough to come to any

reasonable conclusion on this case," is an option that the Board could exercise if founded upon a standard of a burden of proof and upon the facts and the law.

However, an examination of the evidence and the testimony that was adduced does not warrant or substantiate the conclusion reached. This court found the testimony confusing and contradictory—e.g.

"Q—So it is your opinion then that the cost approach in this particular case would be appropriate because of when the building was built?

A—*It was one of them that I took in deep consideration.*"

At another time, the Commissioner testified as follows:

"I didn't establish a cost approach, I didn't establish an income approach, I based my whole judgment on the way I answered the question sometime before."

On another occasion, the Commissioner concluded,

"The Board of Appeals is totally autonomous and we use *our own standards, our own judgment* and that's how cases are determined."

The taxpayer submitted the customary complaints accompanied by an extensive petition. Exhibits to the petition included,

1—Application for payment and sworn statement for Contractor and Subcontractor to owner.

2—Footage rented by month for the year 1978.

3—Office building tenant roster as to space and occupancy.

4—Comparative statement of earnings for 12 months, ending September 30, 1978.

In addition, there was submitted the "recommendation" of the Assessor.

The taxpayer created a prima facie case which of course was rebuttable. The taxpayer's case had to be resolved in accordance with the proper standards.

An examination of the property's valuation had to be undertaken according to established rules for property valuation. The primary rule of market values is to be used. However, as here, where no market value could be determined or where the market value is not truly reflective of worth, reproduction cost less depreciation and capitalization of income are to be employed. This was not done

JUDICIAL NOTICE—PRIME RATE, INFLATION AND JUSTICE

The classical rendition of the concept of judicial notice was made in *Chicago v. Murphy*, 313 Ill. 98, 102, wherein the court stated,

> "Courts are presumed to be no more ignorant than the public generally, and will take judicial notice of that which everyone knows to be true."

The court may therefore take judicial notice of a variety of economic and financial facts and conclusions. Included therein the court may take note of the changing value of money as well as the current status of our inflation and its impact upon property. In *Downs v. Baltimore & Ohio R.R. Co.*, 345 Ill. App. 118, 134, the court took judicial notice of the substantial shrinkage in the value of the dollar. It has been the policy of our courts to take judicial notice of specific financial facts of a public character which are of a generalized nature and of readily verifiable certainty.

The taxpayer paid under protest the amount of taxing predicated upon the original assessment. There was evidence in the record that at the time of the tax obligation, the taxpayer suffered from a negative cash flow. Hence, if the taxpayer had to comply with the statutory mandate of posting an additional $800,000, it alleges that it would cost the taxpayer at the time of the complaint an additional $213,986 for two years based upon a prime rate of 13.25 percent per year. The current rate is 20 percent. In addition, assuming that the $800,000 was

deposited—at the current inflation rate of 18 percent—the $800,000 upon return would be debased in purchasing power from the time of the initial deposit.

Justice Cardoza warned against the creation of "misfortune of forcing methods of taxation and collection with a Procrustean Formula." The unrelenting process of tax collection cloaked by statutory punctiliousness in *all* circumstances can and does create injustice. This rigid adherence and its consequence was rejected by our Supreme Court when it said,

> "Under these circumstances, it would be extremely unfair and unjust for this court to adhere to a *rigid formula* which would require that all relief from fraudulently excessive assessments be sought through the legal remedy provided by statute. This is a proceeding in equity and a court of equity is not bound by strict formulas but may *'shape its remedy to meet the demands of justice in every case,' however peculiar." (Hoyne Savings & Loan Assn. v. Hare,* 60 Ill.2d 84, 90)

Therefore under the equitable powers of this court, it has sought to shape a remedy for the taxpayer "to meet the demands of justice" in this case.

THE CONSTITUTIONAL ISSUES

When asked to declare a statute unconstitutional, trial courts especially must exercise great restraint and employ careful consideration. Hence, the court must examine the constitutional question with due deliberation. The exercise of judicial power in this area requires the court to bear in mind the fundamental rules of construction as established by our judicial system.

"A statute is presumed to be valid and all doubts or uncertainties arising either from the language of the constitution, or the act itself, must be resolved in favor of the validity of the act; and this court will assume to declare it void only in the case of a clear conflict with the constitution. We have further held that it is the duty of this court to so construct acts of the legislature as to uphold their

constitutionality and validity if it can reasonably be done, and further, that if their constitutionality is doubtful, the doubt will be resolved in favor of the validity of the law attacked."
(*People v. Adduci*, 412 Ill. 621, 624)

"While the passage of time is not conclusive as to the validity and constitutionality of a statute, it creates a strong presumption against its invalidity.
(*People v. Jarmuth*, 386 Ill. 66, 76)

"A court is never warranted in declaring a legislative enactment void unless it *clearly and palpably* transcends the fundamental law."
(*People ex rel. Curren v. Schommer*, 392 Ill. 17)

"A trial court will not consider constitutional questions if the case may be disposed of on other grounds."
(*People v. Vandiver*, 51 Ill.2d 525, 258)

"The judicial power to determine the constitutionality of legislation is to be exercised only where it is essential to the disposition of the case, and where, as here, both constitutional and non constitutional issues are raised, we will not consider the constitutional issues if the cause can be determined on other grounds, even though we acquire jurisdiction of the case because a constitutional question is involved."
(*Bismarck Hotel Co. v. Petriko*, 21 Ill.2d 481, 485)

The matters before this court have been determined upon grounds other than constitutional—Hence, there is no need to consider the alleged constitutional violations. The relief granted in a court of equity where constructive fraud exists in the assessment meets the ends of justice.

Constructive fraud is a juridical concept. Our Supreme Court in *People ex rel. Nordlund v. S.B.A.*, 34 Ill.2d 373 at 378, said,

> "unfortunately this concept (constructive fraud) as other legal concepts, is not susceptible to precise definition. Our system of juris-prudence requires that these inexact criteria be dealt with on a case-to-case basis. It is fundamental however, that it is not

the function of the judiciary to act as a super Board of Review, but only to protect the public from fraudulent discriminatory taxation and clear abuse of administrative authority."

Principles governing challenges to assessments have generally been explicated by our courts as follows: To sustain the proof that constructive fraud was perpetuated, the evidence of the taxpayer must be *clear and sufficient.* It must clearly establish that the assessment was made in ignorance of values, mistake or in that ascertainable facts were disregarded, or that the Assessor did not exercise honest judgment because of conduct which sought by design to impose excessive valuation. In essence, the evidence establishes that honest judgment was not exercised and in lieu thereof there was wilful and intentional discrimination. An assessment merely because it is excessive does not constitute fraud, and the court will not set aside an assessment because of a difference of opinion as to value. The issue here is one of mistake and not a difference of opinion as to value.

COUNT II
SECTION 1983 TITLE 42

The taxpayer in Count II seeks damages against Commissioners Semrow and Zaban in the amount of $100,000 pursuant to Section 1983, Title 42 of the United States Code. At the conclusion of the plaintiff's case, the court sustained a motion by defendants for judgment.

Section 64 (3) of the Civil Practice Act specifically requires the trial court in a bench trial "to weigh the evidence including any which may be favorable to defendant which necessarily requires the court to draw reasonable inference therefrom, determine the credibility of witnesses, and then simply not decide whether the plaintiff has made out a prima facie case, but make a final determination and enter judgment for defendant if the plaintiff has not met his burden of proof by preponderance of the evidence."
(*Hawthorne Mellody Farms Dairy v. Rosenberg,* 11 Ill. App.3d 739)

In applying this standard, the court concluded that pursuant to the criteria established in *Fulton Market Cold Storage v. Cullerton*, 582 F.2d 1071, that the plaintiff taxpayer failed to clearly establish that the Commissioners Semrow and Zaban intentionally or with reckless disregard, violated the constitutional rights of the taxpayer.

COUNT III
WRIT OF CERTIORARI

The court as to the writ of certiorari is limited only to an inspection of the records of the Board's proceedings. The court cannot question facts or decide them. There can be no extrinsic evidence. The court has examined the record and finds that the Board proceeded illegally. Therefore, the proceeding before the Board of Appeals is hereby quashed.

CONCLUSION

The court finds the equity with the plaintiff. However, an order shall be prepared in conformity with this Memorandum of Decision and its determination that the proper assessed valuation is $3,910,346. The taxpayer has seen fit to pay under protest tax liability monies predicated upon the initial assessment—additional sum is due to the collector, based upon the court's determination of the assessed valuation.

/s/ Earl Arkiss
Judge

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

[April 22, 1980]

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, as Trustee under Trust Agreement dated March 17, 1975, and known as Trust No. R-1809,

Plaintiff,

No. 79 CH 6357 *vs.*

EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois, et al.,

Defendant.

FINAL INJUNCTION ORDER

This cause coming on for decision, the Court having considered the testimony, evidence and arguments of counsel and being fully advised in the premises; and the Court having issued a Memorandum of Decision in this matter:

NOW, THEREFORE, the Court finds:

1. It has jurisdiction of the subject matter and the parties to this action;

2. The total assessment complained of herein ($8,088,-356) is constructively fraudulent and under the unusual facts of this case (as set forth more fully in the Memorandum on Decision which is incorporated in this Order by reference) injunctive relief is proper.

3. In denying relief to the plaintiff, the Board of Appeals proceeded illegally.

4. The equities are with the plaintiff in that the proper total assessed valuation is $3,910,346.

5. Plaintiff has failed to sustain its burden of proof with respect to Count II of the First Amended Complaint.

WHEREFORE, it is hereby ordered that:

1. Upon Count II of the First Amended Complaint, judgment is entered in favor of the defendants and against the plaintiff;

2. The proceedings before the Board of Appeals is hereby quashed;

3. Plaintiff shall pay by certified check to the Collector the $86,920.93 referred to on Schedule A attached hereto plus interest at 2% on the amounts set forth in the columns marked "Additional Payment Due" on or before 21 days after the entry of this order. The County Collector, and all defendants, are permanently enjoined from ever collecting or attempting to collect any additional tax, interest or penalties for the ten parcels listed in Schedule A for tax year 1978, other than the aforesaid $86,920.93.

4. Defendants shall mark their Warrant Books and Tax, Judgment, Sale, Forfeiture and Redemption Record, and other records, to reflect the entry of this permanent injunction.

ENTER:

/s/ Earl Arkiss
Judge

Date: April 22, 1980

James A. Rooney
Room 2736
30 North LaSalle Street
Chicago, Illinois 60602
(312) 263-0911
Attorney for Plaintiff

SCHEDULE "A"

P.I.N.	Original Assessed Valuation	Correct Assessed Valuation	Correct 1978 Tax	1978 Tax Previously Paid	Additional Payment Due
11-18-311-009	$50,726	$26,002	$4,484.56	$3,970.02	$ 514.54
11-18-311-010	51,398	26,674	4,600.38	4,085.95	514.43
11-18-311-017	699,987	331,636	57,196.61	49,533.26	7,663.35
11-18-311-018	1,738,514	817,636	141,016.19	121,857.77	19,158.42
11-18-311-022	1,752,134	831,256	143,365.24	124,206.71	19,158.53
11-18-311-024	49,742	25,018	4,314.82	3,800.38	514.44
11-18-311-030	2,104,786	999,732	172,421.97	149,431.82	22,990.15
11-18-311-031-8002	272,712	149,089	25,713.16	23,141.11	2,572.05
11-18-311-032-8002	119,963	70,514	12,161.39	11,132.53	1,028.86
11-18-311-033	1,248,394	632,789	109,135.97	96,329.81	12,806.16
TOTALS	8,088,356	3,910,346	674,410.29	587,489.36	86,920.93

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, as Trustee,

Plaintiff,

No. 79 CH 6357 *v.*

EDWARD J. ROSEWELL, et al.,

Defendants.

ORDER

This cause coming on to be heard on Defendants' Motion to Vacate and Plaintiff's Reply to Motion to Vacate and Counter Motion to Vacate, due notice served, the court being fully advised,

It is hereby ordered that:

1. Defendants' Motion to Vacate is denied. Plaintiff's Counter-Motion to Vacate is also denied.

June 2, 1980

ENTER:

/s/ Earl Arkiss
Judge

Michael F. Baccash, A.S.A.
Attorney for Defendants
500 R.J.D. Center
Chicago, Ill. 60602
443-5444

APPENDIX 4

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 28, 1983

Mr. James A. Rooney
Attorney at Law
69 W. Washington St., S#2313
Chicago, IL 60602

No. 55931—First National Bank and Trust Company of Evanston, as trustee, etc., appellee, vs. Edward J. Rosewell, Treasurer of Cook County, Illinois, et al., etc., appellants. Appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the Petition for Rehearing filed in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

APPENDIX 5

IN THE
SUPREME COURT OF ILLINOIS

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, TRUST R-1809,

Plaintiff-Appellee, Cross-Appellant,

No. 55931 *vs.*

EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois,

Defendant-Appellant,

HARRY H. SEMROW and SEYMOUR ZABAN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois,

Defendants-Appellants, Cross-Appellees,

THOMAS C. HYNES, Assessor of Cook County, Illinois,

Defendant.

Appeal from the Appellate Court of Illinois
First Judicial District

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that FIRST NATIONAL BANK OF EVANSTON, Trustee, the Plaintiff-Appellee, Cross-Appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Illinois entered November 18, 1982, Petition for Rehearing denied by Order dated January

28, 1983, affirming in part and reversing in part the judgment of the Appellate Court of Illinois, First Judicial District, entered in this action.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

FIRST NATIONAL BANK
OF EVANSTON, Trustee,
Plaintiff-Appellee, Cross-Appellant

By: /s/ James A. Rooney
Room 2313
69 West Washington Street
Chicago, Illinois 60602
(312) 332-2600
Attorney for the Plaintiff-Appellee, Cross-Appellant.

[Filed Feb. 4, 1983]

IN THE
SUPREME COURT OF ILLINOIS

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, TRUST R-1809,

Plaintiff-Appellee, Cross-Appellant,

No. 55931 *vs.*

EDWARD J. ROSEWELL, Treasurer of Cook County, Illinois,

Defendant-Appellant,

HARRY H. SEMROW and SEYMOUR ZABAN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois,

Defendants-Appellants, Cross-Appellees,

THOMAS C. HYNES, Assessor of Cook County, Illinois,

Defendant.

NOTICE OF FILING AND
PROOF OF SERVICE

To: THOMAS J. MCNULTY, Esq.
Assistant State's Attorney
Room 500-Daley Center
Chicago, Illinois 60602
Attorney for Defendants-Appellants, Cross-Appellees

PLEASE TAKE NOTICE that on Wednesday, February 2, 1983, we filed our Notice of Appeal to the Supreme Court of the United States with the Clerk of the Supreme

Court, Supreme Court Building, Springfield, Illinois 62706.

/s/ James A. Rooney
Room 2313
69 West Washington Street
Chicago, Illinois 60602
(312) 332-2600
Attorney for the Plaintiff-Appellee, Cross-Appellant

CERTIFICATE OF SERVICE

JAMES A. ROONEY, an attorney, hereby certifies that he served a copy of this Notice of Filing and attached Notice of Appeal on Assistant State's Attorney THOMAS J. MCNULTY, by personal delivery to him in his offices at 500 Daley Center, Chicago, Illinois 60602 on February 2, 1983.

/s/ James A. Rooney
Attorney

APPENDIX 6

SUPREME COURT OF THE UNITED STATES
No. A-847

FIRST NATIONAL BANK OF EVANSTON, ETC.,
Appellant,

v.

EDWARD J. ROSEWELL, COUNTY TREASURER, ETC., ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including June 27, 1983.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 20th day of April, 1983

APPENDIX 7

NO. 55931
IN THE
SUPREME COURT OF ILLINOIS

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, Trustee,

Plaintiff-Appellee, Cross-Appellant,

vs.

EDWARD J. ROSEWELL, etc., et al.,

Defendants-Appellants, Cross-Appellees.

Appeal from the Appellate Court, First District.

PETITION FOR REHEARING

JAMES A. ROONEY
Room 2313
69 West Washington Street
Chicago, Illinois 60602
(312) 332-2600
Attorney for Plaintiff-Appellee, Cross-Appellant

[Date: December 8, 1982]

NO. 55931
IN THE
SUPREME COURT OF ILLINOIS

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, Trustee,

Plaintiff-Appellee, Cross-Appellant,

vs.

EDWARD J. ROSEWELL, etc., et al.,

Defendants-Appellants, Cross-Appellees.

Appeal from the Appellate Court, First District.

PETITION FOR REHEARING

Now comes the petitioner, FIRST NATIONAL BANK OF EVANSTON, Trustee, by its attorney, JAMES A. ROONEY, and, pursuant to Rule 367, petitions for a rehearing of this appeal.

In support of this petition, petitioners believe that this Court's opinion of November 19, 1982 has misconstrued or overlooked the following points.

I

WEBB'S FABULOUS PHARMACIES, INC. v. *BECKWITH* (1980), 449 U.S. 155, 66 L.Ed.2d 358, 101 S.Ct. 446 IS CONTROLLING IN THIS CASE.

This Court found that "the absence of any service charge in connection with the Revenue Act's remedy of payment under protest" meant the retention of interest

earned on funds successfully protested was not constitutionally prohibited. (Slip Opinion, page 5)

This Court has overlooked the fact that the county receives another return for services rendered in connection with the remedy of payment under protest. The county is allowed to keep 100% of the interest earned on unsuccessfully protested funds. (This is so even under Public Act 82-598.) Therefore, *Webb's* is controlling and the keeping of 100% of the interest earned on successfully protested funds is unconstitutional.

As early as 1915 this Court adopted the rule that interest follows the principal where funds are deposited subject to order of court. *Galpin v. City of Chicago* (1915) 269 Ill. 27, 57. As was pointed out to this Court, at the time *Lakefront Realty Corp. v. Lorenz* (1960) 19 Ill.2d 415 was decided, there was no statutory requirement that the protest fund be invested and there was, therefore, no interest available to be distributed.[1] Section 192(a) of the Revenue Act was added effective August 1, 1961.

Finally, this Court has deemed the protested funds not to be private funds. The Supreme Court of Florida had found the funds in *Webb's* to be public funds. The Supreme Court of the United States reversed stating: "(A) State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court." (449 U.S. at 164)

---

[1] In finding the Illinois remedy of payment under protest "plain speedy and efficient" for purposes of the Tax Injunction Act (28 U.S.C. 1341) the Supreme Court of the United States in *Rosewell v. LaSalle National Bank* (1981), 450 U.S. 503, 67 L.Ed.2d 464, 101 S.Ct. 1221 obviously assumed that Illinois would have to appropriate funds to pay the interest. See footnote 36 of the opinion at 450 U.S. 528. The court was unaware that interest was being earned on the protested funds pursuant to Section 192(a) of the Revenue Act. Given this fact, *Webb's* and the reluctant concurrence of Justice Blackman in *Rosewell*, it is debatable whether the Supreme Court of the United States would reaffirm its holding in *Rosewell*.

Petitioners submit that funds which are successfully protested are refunded because they are found not to be public funds. The fact that our state statutes force the funds to be paid to the collector until that finding is made does not transform the funds from private property to public property.

II

THE ALLOWANCE OF THE RETENTION OF INTEREST AS AN *IN LIEU* FEE FOR ADMINISTERING THE PROTEST FUND VIOLATES SECTION 9(a) OF ARTICLE VII OF THE CONSTITUTION OF ILLINOIS.

The defendant taxing officials did *not* argue that the retention of all interest earned on successfully protested funds was a fee for services rendered. Petitioners' supplemental brief (at pages 34-35) pointed out that such a construction would, however, amount to the fee being in violation of section 9(a) of article VII of the Constitution of Illinois.

This Court's opinion construed the retention of interest as an *in lieu* fee but never responded to the argument that such a fee would be unconstitutional.

Petitioners submit that this Court's opinion is in direct opposition to *Saltiel v. Olsen* (1979), 77 Ill.2d 23, 25-27; *Goldstein v. Rosewell* (1976), 65 Ill.2d 325, 329-330; and, *City of Joliet v. Bosworth* (1976), 64 Ill.2d 516, 523-531.

The retention of interest earned on the taxes disbursed (either to the taxpayer or the taxing district) is the type of hidden tax which the constitutional provision was designed to prevent.

As this Court stated in *City of Joliet v. Bosworth* (1976), 64 Ill.2d 516, 531-532:

> "The constitutional provision in the case before us . . . reflects a determination by the framers of the Constitution that the collection of taxes by county officers is a county function which should be supported by county taxes."

The administration of the protest fund is but one of the many steps taken by the collector in the process of collection of taxes.

III

THE OPINION OF THIS COURT FAILS TO GIVE EFFECT TO THE LEGISLATURE'S INTENT WHEN IT PASSED PUBLIC ACT 82-598.

While admitting that Public Act 82-598 amended the payment-under-protest remedy to provide for a refund of interest earned on successfully protested funds, this Court, without citation, stated:

> "that action (of the General Assembly) does not indicate that the remedy was previously inadequate." (Slip opinion, page 4) (Insert for clarity)

This Court has repeatedly held that where a remedial statute is changed or amended while a case is on appeal, this Court *must* decide the case on the basis of the law in effect at the time the opinion is issued. *Landesman v. General Motors Corp.* (1978) 72 Ill.2d 44, 48; *Steinberg v. Chicago Medical School* (1977) 69 Ill.2d 320, 337.

Moreover, in construing any statute, this Court should ascertain and give effect to the intent of the General Assembly by considering the reason or necessity for the amendment; contemporaneous conditions; existing circumstances; the object sought to be obtained or the defects sought to be remedied by the amendment and the betterment or improvement of existing remedies. *Baker v. Conrad* (1936) 364 Ill. 386, 392-393; *Moyer v. Bd. of Ed. of School Dist. No. 186* (1945), 391 Ill. 156, 162.

This Court has admitted that *stare decisis* (in this case citation of *Lakefront Realty Corp. v. Lorenz* (1960), 19 Ill. 2d 415 and *Clarendon Associates v. Korzen* (1973), 56 Ill. 2d 101) weighs heavily in statutory construction, but the legislature is free to change court interpretations of its legislation. *Williams v. Crickman* (1980), 87 Ill.2d 105, 111. Reenactment implies that judicial construction is approved of by the legislature. *Union Elec. Co. v. Illinois Commerce Commission* (1979), 77 Ill.2d 364, 380. How-

ever, amendment suggests either that the legislature has effected a conscious change in policy or that it has simply prevented the recurrence of an erroneous interpretation. *People ex rel Clark v. Wheeling* (1962) 24 Ill.2d 267, 268-269.

The enactment of Public Act 82-598 is a conscious change in policy in reaction to recent language from the Supreme Court of the United States. The legislative history makes clear that the General Assembly which enacted Public Act 82-598 has declared the remedy, as it existed, inadequate. (Supplemental Brief—Appendix, D-7 through D-25) If, after a statute has been construed and interpreted, the legislature makes radical changes, an intention is thereby shown to establish a rule different from that announced by the courts. *Dworak v. Temple* (1958), 18 Ill. App.2d 225, 230, affd. 17 Ill.2d 181; C.F. *In re Zimmerman's Estate* (1978), 63 Ill. App.3d 560.

Despite this Court's earlier pronouncements that the remedy was adequate, the General Assembly has the authority to overrule this Court by amending the statute. They have unequivocally done so and this Court must give effect to their intent and the motives behind the change in the law. *People ex rel Gamble v. McKinstry* (1942), 379 Ill. 528, 531.

CONCLUSION

This Petition for Rehearing should be allowed.

Respectfully submitted,

JAMES A. ROONEY
Room 2313
69 West Washington Street
Chicago, Illinois 60602
(312) 332-2600

Attorney for Plaintiff-Appellee, Cross-Appellant

Date: December 8, 1982

APPENDIX 8

IN THE
SUPREME COURT OF ILLINOIS
(Decided March 25, 1983;
Rehearing Denied May 27, 1983)

Docket No. 55910—Agenda 29—September 1982.

SHELL OIL COMPANY, *et al.*, Appellees, v. THE DEPARTMENT OF REVENUE *et al.*, Appellants.

JUSTICE WARD delivered the opinion of the court:

The question on this appeal is whether a taxpayer whose protest had been upheld is entitled to interest income earned on the erroneously assessed taxes that by order of court were paid into a protest fund and held by the State Treasurer as trustee. We granted the plaintiffs' petitions for direct appeal under our Rule 302(b) (73 Ill. 2d R. 302(b)).

In 1979, the Department of Revenue, pursuant to statutory provision (Ill. Rev. Stat. 1979, ch. 34, par. 409.1), assessed county retail occupation taxes against Shell Oil Company (Shell) on sales of jet fuel by Shell to American Airlines in 1974, 1975, and 1976. The total tax assessment was in the amount of $1,182,535, and accrued interest of $552,901 was claimed. The Department's assessment against Shell for sales of fuel in the same years to United Airlines was $1,996,695 in taxes, and $923,895 were claimed as interest. The two airlines, pursuant to provisions in their contracts with Shell, paid the taxes and interest under protest. Shell, American Airlines and United Airlines brought an action on September 26, 1979, against the Department of Revenue, the Director of Revenue and the State Treasurer to recover the taxes paid under protest, pursuant to "An Act in relation to the payment and disposition of moneys received by officers and employees of the State * * *." (Ill.

Rev. Stat. 1979, ch. 127, par. 170 *et seq.*) (the Protest Monies Act). On the same day the circuit court of Cook County entered orders enjoining the defendants from depositing any of the protest funds into the State Treasury. The defendants did not file answers to the complaints until June 4, 1980, and the two cases were consolidated on September 28, 1980. On February 6, 1981, the circuit court held for the plaintiffs and granted summary judgment against the defendants and ordered that the moneys paid under protest be refunded. No appeal was taken by the defendants.

While these actions were pending in the circuit court, interest was earned on the protest funds through investment by the State Treasurer, who, as trustee, was holding the moneys in special funds. The Treasurer, however, instead of crediting the interest earned to the protest funds, deposited the interest in the State's general revenue fund. When the circuit court entered summary judgment in favor of the plaintiffs, they laid claim to the interest which had been earned on the protest funds during the pendency of their actions. On August 13, 1981, the court held that the plaintiffs were entitled to the interest income earned. Six days later the trial court entered orders directing the defendants to issue credit memoranda in favor of the taxpayers for $244,563.44, the interest earned on the American Airlines protest fund and for $411,579.29, the interest earned on the United Airlines protest fund. The Department of Revenue filed notices of appeal to the appellate court, and we granted the plaintiffs' petitions for direct appeal to this court under Rule 302(b) (73 Ill. 2d R. 302(b)).

A taxpayer who questions the correctness of an assessment of retailers' occupation tax may (1) withhold payment of the tax and receive an administrative hearing following receipt of a notice of tax liability from the Department of Revenue; or (2) pay the tax, file a claim for credit or refund, and have an administrative hearing after protesting the Department's notice of tentative determination of claim (see Ill. Rev. Stat. 1979, ch. 120, par. 440 *et seq.* (the Retailers' Occupation Tax Act)); or (3)

pay the tax under protest pursuant to the Protest Monies Act and have the circuit court pass upon the protest (*Chicago & Illinois Midland Ry. Co. v. Department of Revenue* (1976), 63 Ill. 2d 474). (See Chester, *View of the Taxpayer's Attorney on Revenue Litigation*, 54 Chi. B. Rec. 173 (1973).) The taxpayer here chose the third option, paying the tax under protest. The plaintiffs succeeded in their protest actions and are now defending the circuit court's award of the interest earned on the protest funds.

Interest is not normally recoverable, in the absence of a statute or an agreement providing for it. (*Lakefront Realty Corp. v. Lorenz* (1960), 19 Ill. 2d 415.) In *Lakefront Realty*, this court considered for the first time whether interest should be allowed in the case of tax refunds. The court observed that though in some jurisdictions it has been held that, where a taxpayer is entitled to a refund because of an overpayment of taxes, he is entitled also to interest on the refund, it would not allow interest on tax-refund payments in the absence of a statute expressly providing for it. The court stated that "interest, being a creature of statute, is recoverable only by statute or contract, and * * * a tax collector, being a mere trustee of public funds collected for specific purposes, has no money to pay interest in the absence of statutory authority to establish a fund for that purpose." (19 Ill. 2d 415, 423.) Had the taxes here been paid under the second option described above and had the protest been upheld, the taxpayer would be entitled to statutory interest of ½ of 1% per month under section 6 of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1979, ch. 120, par. 445.) The Protest Monies Act, however, does not have a provision for interest on a refund of protested taxes. That the legislature did not include a provision for interest, the defendants argue, shows an intent to deny recovery of interest to a taxpayer who has been successful in a protest action under the Protest Monies Act. Too, it is argued, that the allowance of interest would constitute a money judgment against the State in violation of its sovereign immunity.

We do not disagree with the observation that a taxpayer who has successfully challenged an assessment of taxes by way of the Protest Monies Act is not entitled to recover interest on the protest funds simply as a matter of course. We consider, however, that the taxpayer here is entitled to the interest earned by investment of the protest funds.

The circumstances here differ from those in *Lakefront Realty* in that interest income was actually earned on the protest funds. Payment of the interest income to the successful taxpayer does not present the problem in *Lakefront Realty*, where no money was available to pay interest on the fund. The case here is not one in which the taxpayer is requesting interest on the protest fund as a matter of course. The taxpayer is simply seeking the income earned from money it was determined it had no legal duty to pay as taxes. The interest income, as it accrued, belonged neither to the State nor to the county for whose benefit the taxes were collected. The Treasurer's authority, as trustee, to invest these funds did not affect the ownership of the funds or entitle him to keep the interest so earned. *Cf. Town of City of Peoria v. O'Connor* (1981), 85 Ill. 2d 195, 207.

Even in the absence of statutory authorization, a court may award interest in a proceeding against the State if equitable considerations warrant it, as long as the effect of doing so does not constitute the entering of a money judgment against the State. (*City of Springfield v. Allphin* (1980), 82 Ill. 2d 571, 579.) Whether an award of interest would be a money judgment against the State can be determined by examining the source from which the interest money would be paid. In *Campbell v. Department of Public Aid* (1975), 61 Ill. 2d 1, this court held that the appellate court's order requiring the Department of Public Aid to make retroactive payments to the plaintiff, even though the appropriations out of which the payments would be payable had lapsed, was a monetary judgment against the State and therefore prohibited. In *Campbell* it was noted that the record contained "nothing relevant to the availability of funds with which to pay the

sums ordered paid." (61 Ill. 2d 1, 6.) The record here, however, discloses that the interest income earned by the Treasurer is available to pay the taxpayer. An award of the interest income will not result in a money judgment against the State, since the Treasurer will pay the interest generated in his capacity as a trustee. Too, the ultimate source of the interest income is the bank or other entity with which the fund was invested.

At no time did the protest fund become the property of the State. The Treasurer acted merely as trustee of the protest fund (see Ill. Rev. Stat. 1979, ch. 127, par. 172) and, as such, he is not entitled to any income or fee for his services absent statutory authorization. (See Ill. Rev. Stat. 1979, ch. 24, par. 8-11-1.) The protest action was instituted simply to determine whether the county or the taxpayer was entitled to the funds paid under protest. As previously mentioned, the interest income never belonged to the State. The Treasurer could not deny the taxpayer the right to that income by transferring it to the State's general revenue fund.

In addition, there is statutory authority for the payment of interest income from a protest fund to a taxpayer. Section 2a of the Protest Monies Act (Ill. Rev. Stat. 1979, ch. 127, par. 172) requires the Treasurer to place money paid under protest in a "special fund to be known as the protest fund." Section 1 of "An Act relating to certain investments of public funds by public agencies" (Ill. Rev. Stat. 1979, ch. 85, par. 901) described special funds as "public funds" for purposes of the Act. Section 2 states, in part:

> "All earnings accruing on any investments or deposits made pursuant to the provisions of this Act shall be credited to the public agency by or for which such investments or deposits were made, except where by specific statutory provisions such earnings are directed to be credited to and paid to a particular fund." (Ill. Rev. Stat. 1979, ch. 85, par. 902.)

Specific statutory direction to credit accrued earnings to the special protest fund appears in section 2 of "An Act in relation to state moneys" (Ill. Rev. Stat. 1979, ch. 130, par. 21), where it is provided:

> "All interest received or paid on account of money in the State treasury belonging to or for the use of the State so deposited in banks, shall be the property of the State of Illinois. If any moneys held in special funds in the State treasury, not belonging to the State, shall be deposited in banks pursuant to the provisions of this Act, the interest received thereon shall be credited to the special fund so deposited."

Although it does not affect our decision here, we note that the legislature has recently amended section 194 of the Revenue Act of 1939 (Ill. Rev. Stat. 1981, ch. 120, par. 675) to provide for the payment of interest in cases of refunded real property taxes paid under protest. The amendment reads:

> "Such amounts paid under protest and withheld from distribution shall be deposited by the collector in interest bearing accounts. If the final order of a court on the protest results in a payment to the taxpayer of all or a part of the taxes paid under protest and withheld, all or a proportional share of such interest earned during the pendency of the protest by the amount repaid to the taxpayers shall also be paid to the taxpayer. If the final order of a court on the protest results in a payment to the taxing districts of all or a part of the taxes paid under protest and withheld, the interest earned during the pendency of the protest by such taxes paid to the taxing districts shall be paid into the county treasury." Ill. Rev. Stat. 1981, ch. 120, par. 675.

On this appeal, the defendants have for the first time questioned the authority of the circuit court to order the issuance of credit memoranda in favor of the plaintiffs in amounts equal to the interest earned on the protest funds. The record contains an affidavit of one of the plaintiffs'

attorneys which states that the assistant Attorney General representing the defendants in the circuit court told him that the defendants would not propose any language for the order providing for the payment of interest or suggest any means for payment.

It is axiomatic that questions not raised in the trial court are waived and may not be raised for the first time on appeal. (*Snow v. Dixon* (1977), 66 Ill. 2d 443, 453; *Kravis v. Smith Marine, Inc.* (1975), 60 Ill. 2d 141, 147.) The failure of the defendants to question the order for the issuance of credit memoranda was a waiver of any objection to the court's authority to enter the order. We would note parenthetically that a trial court possesses wide discretion in fashioning an appropriate remedy in revenue cases. *City of Springfield v. Allphin* (1978), 74 Ill. 2d 117.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

CLARK and MORAN, JJ., took no part in the consideration or decision of this case.

APPENDIX 9

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SENATOR DAVIDSON:
The middle column. The first column is what they're receiving this fiscal year, the second column is what they will receive if this formula, as we propose it at fifteen hundred and sixty-six dollars and ninety-four cents and the change in the weighting effect, become law, the last column, the far right column, is what they would receive at the level if there's no change in the formula.
PRESIDING OFFICER: (SENATOR BRUCE)
Further discussion? Senator Davidson may close.
SENATOR DAVIDSON:
Just ask for an Aye vote. This is a, as Senator Berman said, this is probably the opening round of the School Funding Formula, which we usually have up several times for discussion between now and June 30th. Ask for an Aye vote.
PRESIDING OFFICER: (SENATOR BRUCE)
The question is, shall Senate Bill 954 pass. Those in favor vote Aye. Those opposed vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, the Ayes are 46, the Nays are 11, none Voting Present. Senate Bill 954 having received the required constitutional majority is declared passed. Senate Bill 955 is on the Tentative Agreed List. 956 is an appropriation bill. We'll hold those until we . . . are we going to call those all at one time, Senator? Alright. 957, Senator Bowers. Read the bill, Mr. Secretary, please.
ACTING SECRETARY: (MR. FERNANDES)
Senate Bill 957.
(Secretary reads title of bill)
3rd reading of the bill.
PRESIDING OFFICER: (SENATOR BRUCE)
Senator Bowers.

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SENATOR BOWERS:
Mr. President, before I start . . . Mr. President . . .
PRESIDING OFFICER: (SENATOR BRUCE)
Senator Bowers.
SENATOR BOWERS:
Before I . . . start on explaining this particular bill, . . . I made an error on 941. I was working on the Agreed Bill List, as a matter of fact, and punched a green light and intended to punch a red and I'd like the Journal to so show.
PRESIDING OFFICER: (SENATOR BRUCE)
Our electronic tape will so indicate.
SENATOR BOWERS:
Now, with respect to the bill. Senate Bill 957 . . . seeks to pay interest on tax objection money that is held by local governmental units or . . . or actually held by the Treasurer for the benefit of local governmental units, during the tax protest period. Under Illinois law, if you want to . . . contest real estate taxes, you have to pay the tax under protest then file your protest. The resolution of that may take two to three to four years, depending upon what jurisdiction you're in. Some of them may be somewhat less. And under the law . . . there is no way for the taxpayer, if the taxpayer wins, to obtain any interest on their funds. Now, I had distributed to the membership an editorial from the Chicago Tribune commenting on an Illinois . . . or a United States Supreme Court case where all the Justices were critical of the Illinois system, although they did hold in a split decision, that the Federal Injunctive Act did not apply. But under the circumstances it seems equitable that a taxpayer ought to get interest on the funds during this period of time and I would ask for a favorable roll call.
PRESIDING OFFICER: (SENATOR BRUCE)

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Is there discussion? Senator Netsch.
SENATOR NETSCH:
Thank you, Mr. . . . thank you, Mr. President. I rise in support of this bill also. Senator Bowers is quite correct that it is responsive to an inequity that was pointed out by the United States Supreme Court and should have been evident to everyone, even without the court decision. It is not fair that people, whose money is tied up for that period of time, receive no interest at all. Senator Bowers' bill would correct that and it is indeed an equitable approach.
PRESIDING OFFICER: (SENATOR BRUCE)
Further discussion? Senator Savickas.
SENATOR SAVICKAS:
Yes, Mr. President and members of the Senate, Senator Netsch did touch on a very important point. The problem though is that you will find that many people will be paying under protest and I doubt if there would be anybody that would just let their . . . pay their bills without being paid under protest if they have any chance at all of receiving the interest on it. Paying under protest would put a burden on our local units of government, whether they are the school districts, the park districts, . . . museum districts, because this money would not be available for them to use and they'd have to go out and sell bonds and whatnot to pay for it. I . . . I think the idea is credible, but the practical application would really harm our local units of government. I would suggest that . . . we . . . bring this bill back for further study, . . . find some way that we can accommodate the concerns of Senator Netsch, but also not hamper our units of local government and burden them with . . . with the financial responsibility then of buying more bonds . . . selling more bonds to pay for operation while these things are under protest. This will be an added burden. A tax increase would

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be necessary. The savings that would be saved . . . or the revenue produced for the . . . the individual that pays under protest in getting interest on his taxes would be deleted by the interest that would have to be paid for the bonds. I would suggest that this bill be defeated.

PRESIDING OFFICER: (SENATOR BRUCE)

Further discussion? Senator Mahar.

SENATOR MAHAR:

Thank you, Mr. President and members of the Senate. I rise in support of this bill. I've found several cases in my area in which people found their taxes was . . . several hundred dollars more than they really should have paid. And the real problem here is it takes up to two years by the time it goes . . . to . . . Judge Dempsey's court in Cook County and then goes back to the Treasurer's Office for payment. In the meantime, some of these people are people who . . . right now are out of work, . . . having problems and they find that if . . . their home is mortgaged their mortgage payments are increased and it's a real problem. I think it's about time that . . . that when it's acknowledged that . . . there's an overpayment that they ought to get interest on their payment and I would ask for a favorable vote.

PRESIDING OFFICER: (SENATOR BRUCE)

Further discussion? Senator Berning.

SENATOR BERNING:

A question of the sponsor please. Refresh my memory because admittedly there may be Statutory provisions now that did not apply when I was county treasurer. At that time admittedly, that's outside Cook County we distributed all tax payments under protest. Is that now prohibited or do you know?

PRESIDING OFFICER: (SENATOR BRUCE)

Senator Bowers.

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SENATOR BOWERS:
I thought it had always been prohibited. I don't know how you could distribute money that is paid under protest . . . until the protestor has lost. As a practical matter, . . . there's no way of getting it back once you distributed it and unless you save some back . . . now, I, frankly, don't know how you did it. As . . . my understanding of the law is this, that if I want to follow the protest there's a certain . . . percentage of that protested money that has to remain within the Treasurer's . . . purview because otherwise if he doesn't keep it . . . and the protestor wins, . . . he has no way of getting it back from the taxing district. So, as far as I know, in answer to your question, no, he cannot distribute it if it's paid under protest and is actively being followed.
PRESIDING OFFICER: (SENATOR BRUCE)
Senator Berning.
SENATOR BERNING:
Well, that may . . . may be technically correct, but I submit that . . . those tax dollars paid under protest are not always resolved as far as the issue is concerned until after the next taxing period or two, the money is always coming in and is available for . . . for . . . repayment, in the event of a decision in favor of the protestor. But I guess more appropriate to this particular issue is, are you suggesting that all tax dollars paid under protest, regardless of the percentage of those dollars which will ultimately be distributed to the taxing district and in most instances that is a substantial portion of the tax dollars, . . . are they all going to earn interest then which will accrue to the benefit of . . . the individual who paid under protest? That doesn't seem to be quite proper either.
PRESIDING OFFICER: (SENATOR BRUCE)
Further discussion? Senator Kenneth Hall . . . Senator Bowers.

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SENATOR BOWERS:
In answer to the question, Senator Berning, no. If the taxpayer loses, the interest goes to the taxing body, but if the taxpayer wins then . . . it's obvious that he overpaid his taxes and that the government, if you will, has been holding his money . . . during that period of time . . . during the protest procedure. So that the bill provides that on those dollars that he wins back, which is, in effect, the dollars he overpaid, he gets interest. It's that simple.
PRESIDING OFFICER: (SENATOR BRUCE)
Senator Berning.
SENATOR BERNING:
Well, for the average taxpayer that's liable to amount to a dollar and thirty-seven cents. I think this . . . may be a good noble gesture that's going to be more of an administrative burden than the benefits can possibly be to the taxpayer.
PRESIDING OFFICER: (SENATOR BRUCE)
Further discussion? Senator Kenneth Hall.
SENATOR HALL:
Will the sponsor yield to a question?
PRESIDING OFFICER: (SENATOR BRUCE)
Indicates he will yield. Senator Kenneth Hall.
SENATOR HALL:
Senator Bowers, I have . . . Senate Bill 263, which . . . established the amount of real estate taxes paid under protest that should be held for distribution by the collector. Now, they've been doing that already for years down in my county. I mean, . . . why do we need a bill now to do that? That's . . .
PRESIDING OFFICER: (SENATOR BRUCE)
Senator Bowers.

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SENATOR BOWERS:
The bill addresses itself to the question of interest on those funds if the taxpayer wins. Under the present law there is no method for the taxpayer to recover any interest on the funds that are, in fact, his and were an overpayment on his taxes. When he wins and gets his money back, he gets . . . he gets interest under this bill and that does not exist under Illinois law today.
PRESIDING OFFICER: (SENATOR BRUCE)
Senator Kenneth Hall.
SENATOR HALL:
Well, I'm not asking for the interest. I'm just asking for . . . that they could use portions of it. Okay. I see where your bill differs.
PRESIDING OFFICER: (SENATOR BRUCE)
Further discussion? Senator Bowers may close.
SENATOR BOWERS:
Well, I just want to comment to Senator Berning and others that . . . the Illinois system . . . has been . . . very seriously criticized by the Supreme Court. Even the majority. Now, Justice Blackman, and this was a split decision, . . . Justice Blackman joined the majority and he commented that Illinois may have little reason to be proud of the system and he expressed a quote, "forlorn hope" that Illinois procedure will be improved so that uncomfortable and distressing litigation like this need not be pursued. I might also add and this is quoted in the Tribune editorial that I passed out to you, that Justice John Paul Stevens and the Tribune rightfully points out he's from . . . practiced law in Chicago for a number of years, he understands the system and he dissented in this and said, "year after year Cook County requires the woman to pay a tax that is three times as

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great as the amount actually due and then after a two year delay the county refunds the overassessment without interest." So, that all we're asking for is fair equity for the taxpayer. In other words, if the taxpayer wins, it was his money all along and he ought to have interest for the period of time the government has kept and used his money. I, therefore, ask for a favorable roll call.

PRESIDING OFFICER: (SENATOR BRUCE)

The question is, shall Senate Bill 957 pass. Those in favor vote Aye. Those opposed vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, the Ayes are 39, the Nays are 8, 1 Voting Present. Senate Bill 957 having received a constitutional majority is declared passed. 960, Senator Gitz. For what purpose does Senator Collins arise?

SENATOR COLLINS:

A point of personal privilege.

PRESIDING OFFICER: (SENATOR BRUCE)

State your point.

SENATOR COLLINS:

In the President's gallery we are honored today with two senior citizens that I feel have made some of the most outstanding contributions in the State. And, as a matter of fact, one of the persons throughout the country in the area of youth . . . programs for youth and also programs for senior citizens and programs in the whole area and the struggle of civil rights. And that is the Reverend Carter and Mrs. Georgia Day. Two people, I think, that have played a very significant role in my life because I met both of them when I was about the age of seventeen on the west side of Chicago. I got involved in my first community activity with Mrs. Day under the Lawndale Youth Commission and they're in

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Terzich has requested him to handle this and the Chair will honor that. Senate Bill 794."

Clerk Leone: "Senate Bill 794, a Bill for an Act to amend an Act in relationship to campaign financial disclosure. Second Reading of the Bill. No Committee Amendments."

Speaker Peters: "Third Reading. Any Amendments from the floor?"

Clerk Leone: "No Floor Amendments."

Speaker Peters: "Third Reading. Senate Bill 827, Representative McGrew? Is the Gentleman on the floor? Out of the record. Senate Bill 836, Representative Findley. Out of the record. Senate Bill 911, Representative Hastert? Read the Bill, Mr. Clerk."

Clerk Leone: "Senate Bill 911, a Bill for an Act to amend the Uniform Hazardous Substances Act of Illinois. Second Reading of the Bill. No Committee Amendments."

Speaker Peters: "Any Amendments from the floor?"

Clerk Leone: "None."

Speaker Peters: "Third Reading. Senate Bill 922, Representative Bullock? Out of the record. Senate Bill 925, Representative Bullock. Out of the record. Senate Bill 953, Representative Swanstrom. Read the Bill, Mr. Clerk."

Clerk Leone: "Senate Bill 953, a Bill for an Act in relationship to lease (sic, release) of tax . . . State Tax Liens. Second Reading of the Bill. No Committee Amendments."

Speaker Peters: "Any Amendments from the floor?"

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Clerk Leone: "None."

Speaker Peters: "Third Reading. Senate Bill 957, Representative Daniels? Read the Bill, Mr. Clerk."

Clerk Leone: "Senate Bill 957 . . ."

Speaker Peters: "Hold on a second. Representative Daniels? 957? Read the Bill."

Clerk Leone: "Senate Bill 957, a Bill for an Act to amend the Revenue Act. Second Reading of the Bill. Amendment #1 was adopted in Committee."

Speaker Peters: "Any Motions with respect to Amendment #1?"

Clerk Leone: "No Motions filed."

Speaker Peters: "Any Amendments from the floor?"

Clerk Leone: "No Floor Amendments."

Speaker Peters: "Third Reading. Senate Bill 989, Representative Stewart? Is the Lady in the chamber? Representative Stewart? Read the Bill, Mr. Clerk."

Clerk Leone: "Senate Bill 989, a Bill for an Act to amend an Act to provide for the manner of proposing Amendments to the Constitution and submitting the same to the electors of the state. Second Reading of the Bill. No Committee Amendments."

Speaker Peters: "Any Amendments from the floor?"

Clerk Leone: "None."

Speaker Peters: "Third Reading. Senate Bill 992, Representative Miller? Out of the record. Senate Bill 1007, Representative Piel. Out of the record. Representative Bullock, do you want to go back and

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pick your Bills up? Happy to accommodate you, Sir. At the bottom of page nine, Senate Bill 922. Representative Bullock."

Clerk Leone: "Senate Bill 922, a Bill for an Act to create a statewide Nursing Education Commission. Second Reading of the Bill. No Committee Amendments."

Speaker Peters: "Any Amendments from the floor?"

Clerk Leone: "None."

Speaker Peters: "Third Reading. Senate Bill 925, Representative Bullock. Read the Bill, Mr. Clerk."

Clerk Leone: "Senate Bill 925, a Bill for an Act to amend the Health Service Education grants. Second Reading of the Bill. No Committee Amendments."

Speaker Peters: "Any Amendments from the floor?"

Clerk Leone: "None."

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Have all those voted who wish? Have all those voted who wish? Mr. Clerk, take the record. On this question, this Bill receiving 149 'yeas', nine 'nos', none voting 'present', receiving the Constitutional majority, this Bill shall be declared passed. Senate Bill 957, Representative Daniels. Representative Zito. Representative Zito please."

Zito: "Yes, Mr. Speaker. Will the clerk read the Bill?"

Speaker Conti: "The Clerk read the Bill."

Clerk O'Brien: "Senate Bill 957, a Bill for an Act to amend Sections of the Revenue Act, Third Reading of the Bill."

Speaker Conti: "Representative Zito."

Zito: "Thank you, Mr. Speaker and Ladies and Gentlemen of the House. Senate Bill 957 amends the Revenue Act to provide the taxpayer who has paid his taxes under protest an opportunity to obtain interest which has accumulated on these protest . . . on these protested taxes during the pendency of the protest if the court rules in the taxpayer's favor. This Bill requires that the collector deposit taxes paid under protest in interest bearing accounts. Also, if the court orders payments to the taxpayer of all or part of the taxes paid under protest and withheld, then the taxpayer shall also receive a proportional share of interest earned during the pendency of the protest. Finally, if the court order results in payment to the taxing district, an interest earned during the pendency of the protest shall be paid into the county treasury. I would move for its adoption. Would be happy to answer any questions at this time, Mr. Speaker."

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Speaker Conti: "The Gentleman from Cook, Mr. Preston."

Preston: "Thank you, Mr. Speaker. Will the Gentleman yield for a question?"

Speaker Conti: "He indicates he will."

Preston: "Representative Zito, then this Bill is a good Bill for consumers, for homeowners who might protest their tax bills?"

Zito: "I think it is an excellent Bill for consumers."

Preston: "I see, so the consumer who would get some interest on the money he has paid in as being held by the assessor or the county collector."

Zito: "That is correct."

Preston: "I see. I think it is a terrific Bill, Mr. Speaker, and I would urge an 'aye' vote."

Speaker Conti: "There being no further discussion, the question is 'Shall Senate Bill 957 pass?' All those in favor signify by voting 'aye', those opposed voting 'no'. Have all those voted who wish? Will the Clerk take the record? On this question there are 145 . . . 4 voting 'yes', six voting 'no', three voting 'present'. This Bill receiving the Constitutional Majority is hereby declared passed. We'll now consider Senate Bills 168 and Senate Bills 1081 relating to unemployment comp . . . insurance. Senate Bill 168, Representative Deuster. Mr. Kane, Representative Kane."

Kane: "I realize that the Speaker has consistently ruled that the Speaker can do this and sort of arbitrarily skip around the Calendar and pick out Bills under

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particular subject matters. And what I was wondering is since you have said that you have this power even though the rules don't give it to you, whether you would give us some advance notice of the general subject matters that you're going to go to in the order in which you're going to go to them so that we're not sort of left here in the dark and blindsighted. I think the whole idea of the rule is that we know in advance where your going to, either you're going to go numerically or by priority of call. And since you have decided that

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I'm sure that will be determined by the copy of the roll call that'll you pass out to your constituents. Senate Bill 929, Senator Berning. Mr. Secretary.

SECRETARY:

Senate Bill 929 with House Amendment No. 1.

PRESIDING OFFICER: (SENATOR SAVICKAS)

Senator Berning.

SENATOR BERNING:

This . . . I move to nonconcur, Mr. President.

PRESIDING OFFICER: (SENATOR SAVICKAS)

Senator Berning moves to nonconcur in House Amendment No. 1 to Senate Bill 929. Those in favor indicate by saying Aye. Those opposed. The Ayes carry . . . have it. The motion carries and the Secretary shall so inform the House. Senate Bill 930, Senator Berning. Mr. Secretary.

SECRETARY:

Senate Bill 930 with House Amendment No. 1.

PRESIDING OFFICER: (SENATOR SAVICKAS)

Senator Berning.

SENATOR BERNING:

Thank you. Senate Bill 930 with the House amendment brings these three systems into compliance with the Federal Age Discrimination and Employment Act and I move for a concurrence.

PRESIDING OFFICER: (SENATOR SAVICKAS)

Is there any discussion? If not, the question is, shall the Senate concur in House Amendment No. 1 to Senate Bill 930. Those in favor will vote Aye. Those opposed vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Take . . . have all voted who wish? Take the record. On that question, the Ayes are 54, the Nays are none, none Voting Present. The Senate does concur in House Amendment No. 1 to Senate Bill 930, and the bill having received the constitutional majority is declared passed. Senate Bill 957, Senator Bowers. Mr. Secretary.

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SECRETARY:
Senate Bill 957 with House Amendment No. 1.
PRESIDING OFFICER: (SENATOR SAVICKAS)
Senator Bowers.
SENATOR BOWERS:
Thank you, Mr. President. House Amendment No. 1 to Senate Bill 957 merely brought another section of the Statute that was in conflict with the bill, as passed, into line and provided for the . . . for the . . . deposit of monies in interest bearing accounts paid to the Corporate Fund of the depositor except where this bill applied and I would move adoption . . . or concurrence in House Amendment No. 1.
PRESIDING OFFICER: (SENATOR SAVICKAS)
Is there any discussion? Senator Berman.
SENATOR BERMAN:
Well, my concern addresses not only the amendment but the original bill. It appears here that the . . . this bill would . . . let me start with a question of the sponsor. Under this bill and the amendment, am I correct that the current law would be changed so that all monies paid under protest would have to be set aside and could not be released at all to the . . . taxing bodies?
PRESIDING OFFICER: (SENATOR SAVICKAS)
Senator Bowers.
SENATOR BOWERS:
I think that's true under the present law. There is a bill floating around here to change that. I'm not sure what happened to it, but under the present law, I think, that's required.
PRESIDING OFFICER: (SENATOR SAVICKAS)
Senator Berman.
SENATOR BERMAN:
Well, my . . . my information was to the contrary. That . . . when

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you pay under protest . . . only a portion of that fund must be retained and the majority . . . the great majority of it is, in fact, released to the taxing bodies. I think that question is crucial because that's . . . that is where the impact of this bill would be. Let me go further and explain that it's my understanding, as it's explained to me, that all of the monies under 957 . . . all monies paid under protest plus the interest would have to be held by the Treasurer until the protest has been determined by court. And if that's what this bill authorizes, contrary to existing laws, it could bring all of local government to a screeching halt by a . . . a . . . a concerted effort to pay under protest. Could you . . . respond?

PRESIDING OFFICER: (SENATOR SAVICKAS)

Senator Bowers.

SENATOR BOWERS:

Well, if you'll . . . if you'll dig out the bill and take a look at it, it says, no protest shall prevent or cause . . . or be a cause of delay in the distribution of tax collection among the taxing bodies of any taxes collected which were not paid under protest. The collector may withhold from distribution the amounts paid under protest or one-half of the total taxes collected, whichever is less. Then it goes on to say, that that amount not distributed has to be put out at interest bearing funds and if the county wins, the county gets the interest, if the taxpayer wins, the taxpayer gets the interest. I don't think it effects it at all.

PRESIDING OFFICER: (SENATOR SAVICKAS)

Senator Berman.

SENATOR BERMAN:

The language you just read, is that existing law or is that new law?

PRESIDING OFFICER: (SENATOR SAVICKAS)

Senator Bowers.

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SENATOR BOWERS:
The language I just read is existing law from the bill. If you need a copy of it, I'll send it over.
PRESIDING OFFICER: (SENATOR SAVICKAS)
Senator Berman.
SENATOR BERMAN:
What you've just read is existing law. So, that all we're . . . all that this bill, you're saying, does is that it addresses the question of interest on that setaside.
PRESIDING OFFICER: (SENATOR SAVICKAS)
Senator Netsch.
SENATOR NETSCH:
Let me . . . confirm this with Senator Bowers. I . . . the language that you just read, most of which is existing law, . . . and then you pick up your original amendment, such amounts paid under protest and withheld from distribution shall be deposited in interest bearing accounts and so forth. I don't, at the moment, have in front of me the text of the House amendment, which I know was primarily a clarifying and technical amendment. Has that been changed in that respect?
PRESIDING OFFICER: (SENATOR SAVICKAS)
Senator Bowers.
SENATOR BOWERS:
No. It . . . it amends a different section of the Statute, which provided . . . that all earnings accruing on investments . . . shall be paid into the Corporate Fund and then it says, except as provided in Section 194. In other words, it was a clarifying section . . . amendment to another section of the Statute.
PRESIDING OFFICER: (SENATOR SAVICKAS)
Senator Netsch.
SENATOR NETSCH:
Thank you, Mr. President. I think then, Senator Berman, that Senator Bowers is quite correct. It does not, in any way,

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change the existing provisions. It simply says that that money, . . . which is allowed to be withheld, will be put in interest bearing accounts and if the taxpayer wins, the taxpayer will be entitled to the . . . to the interest. That . . . this is something that was called to our attention by a United States Supreme Court decision, which very correctly pointed out that the system in Illinois, although not a violation of the Constitution, was unconscionable. Senator Bowers' bill responded to that. If he hadn't done it, I would have. It's a very good bill and I hope that his concurrence will be accepted.

PRESIDING OFFICER: (SENATOR BRUCE)

Further discussion? Senator Savickas.

SENATOR SAVICKAS:

Well, Mr. President, I, too, . . . rise on Senator Berman's concern. I . . . I think . . . I can't see how it doesn't cost a county or a municipality money. When you're withholding and paying under protest . . . you're going to . . . I can't see why people would . . . be willing to pay their taxes . . . not under protest when they have a chance of making the money and putting it in . . . interest bearing accounts for this. I could . . . vision in Chicago in . . . Cook County that . . . some of these consumer groups . . . would use this just as an issue to . . . organize whole communities not to pay their taxes in protest and . . . tie up the whole system. We have . . . groups that . . . constantly . . . solicit membership just through confrontation on some particular issue and this is a very emotional issue . . . to go out to a group of a hundred, two hundred people and say, well, fine, let's withhold all our taxes. You're going to get interest on it, so don't worry about paying it. We'll pay it under protest and . . . if by luck you win, you get interest. It's a terrific idea. And I could see havoc being created in . . . some of these big communities.

PRESIDING OFFICER: (SENATOR BRUCE)

Senator Netsch.

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SENATOR NETSCH:
Well, . . . it probably . . . for the second time, I realize. It probably is not my role to respond to that, but that was a question that was discussed at length in committee and I think when the bill first passed on the Floor. The point is, that if their protest is not a valid one, they aren't going to get the interest. So, it's going to have to be a legitimate . . . objection to the tax in the first place. And I think that reason alone is going to prevent any of the kind of mass . . . withholding of taxes or paying of the taxes under protest that you talk about. This is designed just for the . . . the poor bloke who pays his taxes under a genuine protest or . . . or objection to the basis on which it is being imposed, has to wait maybe two years or more before the issue is finally resolved and then if he wins, when he wins, is told, well, you can have back . . . the tax, but you can't have any interest on it. In the meantime, somebody else has been earning the interest on his money, which a court has now held was his all along. And . . . it is an absolutely unconscionable . . . procedure that we have in the State of Illinois. It just barely survived a Supreme Court attack on constitutional grounds As I recall, the decision was 5 to 4 and it was the Justice from the State of Illinois, Justice Stevens, who pointed out that while he was not going to vote to invalidate the system, . . . Illinois really ought to get its house in order in this respect. So, it seems to me this is absolutely right from the taxpayers' point of view and the danger is just simply not there.
PRESIDING OFFICER: (SENATOR BRUCE)
Further discussion? Further discussion? Senator Bowers may close.
SENATOR BOWERS:
Well, Mr. President, I don't know what I can add that Senator Netsch hasn't already said. It's an unconscionable situation where the taxing body can go in and tax at any rate, keep the money for

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two years and then say, oh, I'm sorry, we made a mistake, here's your money back, but we're not going to give you any interest on it. That's exactly what the Supreme Court said, that the Chicago Press had editorialized on this subject a number of times. It's . . . it's a totally unconscionable situation and I would . . . urge a favorable roll call.

PRESIDING OFFICER: (Senator Bruce)

The question is, shall the Senate concur in House Amendment No. 1 to Senate Bill 957. Those in favor vote Aye. Those opposed vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, the Ayes are 35, the Nays are 17, none Voting Present. The Senate does concur with Senate . . . House Amendment No. 1 to Senate Bill 957, and the bill having received the required constitutional majority is declared passed. For what purpose does Senator Totten arise?

SENATOR TOTTEN:

Before that scoreboard, Mr. President, gets down to zero, could we know what the countdown is for?

PRESIDING OFFICER: (SENATOR BRUCE)

Oh, yes . . . yes . . .

SENATOR TOTTEN:

Five, four, three . . .

PRESIDING OFFICER: (SENATOR BRUCE)

. . . now, wait a minute. If you . . . alright. No, the . . . the scoreboard . . . if I might have the attention of the Body, the scoreboard was wired in its original . . . scheme of things to have a . . . automatic take the record. So, we can set it for any time up to sixty seconds and . . . if you wish, it locks the board automatically. So, . . . so, . . . so, it has been the decision of the Body that we not utilize that because sometime . . . alright . . . alright. Wait a minute . . . wait a minute. Why don't we . . . right . . . for what purpose does Senator Walsh arise?

APPENDIX 10

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE, TITLE 42, SECTION 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes

to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ILLINOIS REVISED STATUTES, 1979

Chapter 120, Paragraph 494 (Section 13 of the Revenue Act of 1939, as amended)

494. Rules of assessing authorities

§ 13. The county assessor, board of appeals, board of assessors and the boards of review shall make and publish reasonable and proper rules for the guidance of persons doing business with them and for the orderly dispatch of business.

In counties containing 1,000,000 or more inhabitants, the county assessor and board of appeals, jointly shall make and prescribe rules and regulations for the assessment of property and the preparation of the assessment books by the township assessors in their respective towns and for the return of such assessment books to the county assessor.

Wherever, in this Act, the board of assessors or the board of review is authorized to act, such action may be taken by a majority of said respective boards.

Chapter 120, Paragraph 594 (Section 113 of the Revenue Act of 1939, as amended)

594. Powers and duties of board of appeals

§ 113. In counties containing 1,000,000 or more inhabitants, the board of appeals in any year shall

(1) On complaint that any property is over assessed or under assessed, or is exempt, review and order such assessment corrected;

(2) Order the county assessor to correct any mistake or error (other than mistakes or errors of judgment as to the valuation of any real or personal property) in the manner provided in Sections 122 and 124 of this Act; and

(3) Direct the county assessor, when he fails to do so on his own initiative, to assess all property subject to assessment which he has not assessed for any reason and enter the same upon the assessment books and to list and assess all property, real or personal, that has been omitted in the assessment of any year or number of years, or if the tax thereon, for which such property was liable for any cause, has not been paid or if any such property, by reason of defective description or assessment thereof, fails to pay taxes for any year or years, in either case the same, when discovered by the board shall be listed and assessed by the county assessor and the board may order the county assessor to make such alterations in the description of real or personal property as it deems necessary. No such charge for tax of previous years shall be made against any real property if (a) the real property was last assessed as unimproved, (b) the owner of such property gave notice of subsequent improvements and requested a reassessment as required by Section 27a of this Act, and (c) reassessment of the real property was not made within the 16 month period immediately following the receipt of that notice.

The board of appeals shall hear complaints and revise assessments of any particular parcel of real property or the assessment of personal property of any person or corporation mentioned or described in a complaint filed with the board and conforming to the requirements of Section 117 of the Act and shall made revisions in no other cases.

Chapter 120, Paragraph 673(a) (Section 192a of the Revenue Act of 1939, as amended)

673a. Proceeds of taxes—Investment

§ 192(a). The county collector shall as provided in Section 2 of "An Act relating to certain investments of public funds by public agencies", approved July 23, 1943, as

amended, invest and reinvest the proceeds of any taxes paid under protest as provided in Section 194 or 195 in obligations of the United States Government maturing not more than 91 days after the date of purchase or may deposit such funds in savings accounts, including certificates of deposit, investment certificates or time deposit open accounts, in banks or savings and loan associations insured by the United States or other federal agency. No more than the amount so insured shall be held in any bank or savings and loan association savings account. Investments made in obligations of the United States Government shall be at the then existing market price and in any event not to exceed par plus accrued interest. The cost price of such obligations and all savings accounts in banks or savings and loan associations shall be considered as cash in the custody of the county collector and shall be conveyed as cash by the county collector to his successor. All earnings accruing on any such investment or bank or savings and loan association savings account shall be credited to and paid into the county corporate fund.

Chapter 120, Paragraph 675 (Section 194 of the Revenue Act of 1939, as amended)

675. Payment of taxes—Payments under protest

§ 194. Except as otherwise provided in Section 224.1 of this Act, current taxes on real property shall be payable in 2 equal installments. The collector, when so requested by the party paying the taxes, shall receive and receipt for such taxes in installments. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes when a particular specification of the part is furnished. If the tax on the remainder of such lot or parcel of land remains unpaid, the collector shall enter such specification in his return, so that the part on which the tax remains unpaid may be clearly known. The tax may be paid on an undivided share of real estate. In such case the collector shall designate on his record upon whose undivided share the tax has been paid.

If any person desires to object pursuant to Section 235 of this Act to all or any part of a real property tax for any year, for any reason other than that the real estate is not subect to taxation, he shall pay the tax installments as they become due, and each installment payment shall be accompanied by a writing, substantially in the following form:

Payment under protest.

Vol. No. ..... Item No. ..... (as the same appear on the General Tax Bill). Original amount of tax $..... Amount of payment $..... This payment shall be applied to the taxes of all taxing bodies ratably, subject to refund of .....% of the tax, which is objected to on the ground (here set forth ground of objection) and is, accordingly, made under protest.

Name of taxpayer .....

Address .....

The person protesting shall present to the collector 2 copies of the written protest signed by himself. The collector shall write or stamp the date of receiving the same upon the copies, and sign the same, one of which copies he shall retain and the other he shall deliver to the person making the payment under protest.

In counties having 1,000,000 or more inhabitants, and in other counties which have adopted the method provided for in Section 224.1, any such written protest, whether of all or any part of a real property tax, shall be presented to the Collector at the time of payment of the second installment of said tax and at no other time.

The person paying real estate taxes under protest shall appear in the next application for judgment and order of sale and object to the taxes in relation to which the protest is made, and upon his failure so to do, the protest shall be waived, and judgment and order of sale entered for any unpaid balance of such taxes.

When any such objection is filed in a county of fewer than 1,000,000 inhabitants, there shall also be filed a

duplicate copy for the use of the State's Attorney and a triplicate copy for the use of the county clerk of such county. Any such objection or amendment thereto filed in a county of fewer than 1,000,000 inhabitants shall contain on the first page thereof a listing of the tax levying units against which the objection is directed. Within 10 days thereafter the clerk of the circuit court shall deliver one copy to the State's Attorney and one copy to the county clerk, taking their receipts therefor. The county clerk shall, within 30 days from the last day for the filing of objections, notify the duly elected or appointed custodian of funds for each tax levying unit, whose tax monies may be affected by such objection, that such objection has been filed. Any amendment filed to such objection, except any amendment permitted to be made in open court during the course of a hearing on such objection, shall likewise be filed in triplicate, with the duplicate copy delivered to the State's Attorney and the triplicate copy delivered to the county clerk by the clerk of the circuit court as hereinabove provided in the case of original objections, and the State's Attorney shall within 10 days of receiving his copy of such amendment notify the duly elected or appointed custodian of funds for each tax levying unit whose tax monies may be affected by such amendment that such amendment has been filed. The State's Attorney shall also notify such custodian and the county clerk in writing of the date, time and place of any hearing before the court to be held upon such objection or amended objection not later than 4 days prior to the hearing thereon. The notices provided herein shall be by letter addressed to such custodian or the county clerk and may be mailed by regular mail, postage prepaid, postmarked within the 30 day period or the 10 day period, as the case may be, but not less than 4 days before a hearing.

In all counties, when the taxpayer appears and files objection, the court shall, after first determining that due notice, if required, has been given to the tax levying unit, hear and determine the matter according to the right of the case and enter judgment for any part of the taxes, or

order a refund of any part of the taxes, so paid under protest. Appeals shall lie from such orders of the court as in other cases of objection to judgment and order of sale for taxes. Refunds shall be made by the collector in accordance with the final orders of the court, and the amount of such refunds shall be deducted from the taxes of the taxing bodies whose taxes were adjudged illegal, in the same or a subsequent year. Proceedings upon objections filed under this Section are subject to Section 194a.

Where any tax is paid in full and protested as herein provided before the delinquent taxes are transcribed into the tax judgment, sale, redemption and forfeiture record, and the taxpayer appears and files objection, the collector, within such time as may be fixed by the court, shall file a transcript from the tax warrant book showing the tax, and such transcript shall be an amendment to the tax judgment, sale, redemption and forfeiture record, and the case shall proceed as if the tax had been originally transcribed therein.

In the payment of real or personal property taxes or any installment of real property taxes, the collector shall first apply such payments to interest (including interest added upon forfeiture to real property taxes) and costs, and after the payment of interest and costs such payments shall be applied upon the total tax of real or personal property upon which the payments are made.

No protest shall prevent or be a cause of delay in the distribution of tax collections among the taxing bodies of any taxes collected which were not paid under protest. The collector may withhold from distribution the amounts paid under protest or ½% of the total taxes collected, whichever is less. The collector shall deduct from the taxes of any taxing body for any year the amount of any tax for any year held illegal by the final order of a court, and use the amount deducted to equalize the distribution.

Chapter 120, Paragraph 710 (Section 229 of the Revenue Act of 1939, as amended)

710. Time of applying for judgment

§ 229. Except as herein otherwise provided, all applications for judgment and order of sale for taxes and special assessments on delinquent lands and lots and for judgment fixing the correct amount of any tax paid under protest shall be made during the month of October: Provided, that in the 10 years next following the completion of a general reassessment of real property in any county containing 1,000,000 or more inhabitants, made pursuant to an order of the Department, applications for judgment and order of sale and for judgment fixing the correct amount of any tax paid under protest shall be made as soon as may be and in any month on the day fixed upon in the publication of the advertisement required by section 225 of this Act, which day shall be specified in the advertisement. If for any cause the court shall not be held on the day specified the cause shall stand continued, and it shall be unnecessary to readvertise the list or notice required by law to be advertised before judgment and sale, but at any time within 30 days after the day so specified for the praying of judgment the court shall hear and determine the matter; and if judgment is rendered, the sale shall be made on the Monday specified in the notice as provided in section 225, such Monday to be fixed by the county collector in the notice. If for any cause the collector is prevented from advertising and obtaining judgment during the month of October it shall be held to be legal to obtain judgment at any time thereafter; but if the failure arises by the county collector's not complying with any of the requirements of this Act, he shall be held on his official bond for the full amount of all taxes and special assessments charged against him: Provided, that any such failure on the part of the county collector shall not be allowed as a valid objection to the collection of any tax or assessment, or to a rendition of a judgment against any delinquent lands or lots included in the application of the county collector, or to the rendition of a judgment fixing the correct amount of any tax paid under protest:

And, provided, further, that on the application for judgment at such subsequent time, it shall not be deemed necessary to set forth or establish the reasons of such failure.

In counties having a population of 1,000,000 or more inhabitants, the application for judgment upon delinquent special assessments or special taxes in each year shall include only such special assessments, special taxes, or installments thereof, and interest, as shall be returned as delinquent to the county collector on or before the first day of August in the year in which the application is made, and in the case of those levied upon property in any city having a population of 1,000,000 or more inhabitants as were marked on the general tax books of the county collector on or before the 10th day of March of the same year or within 15 days after the county collector received the general tax books in such year: Provided, that such judgment of sale shall include interest on matured installments up to the date of such judgment: Provided, further, that in the 10 years next following the completion of a general reassessment of real property in any county having 1,000,000 or more inhabitants, made pursuant to an order of the Department, notwithstanding that such special assessments, special taxes, or installments thereof, and interest shall not be returned as delinquent to the county collector, on or before the 1st day of August in the year in which such application is made, and in the case of those levied upon property in any city having a population of 1,000,000 or more inhabitants, notwithstanding that such special assessments, special taxes or installments thereof, and interest, were not marked on the general tax books of the county collector, on or before the 10th day of March of the same year or within 15 days after the county collector received the general tax books in such year, such application shall be made during the month of October for judgment and order of sale for special assessments, special taxes, or installments thereof, and interest, in each year on delinquent lands and lots, and the county collector shall include in such application all special assessments, special

taxes, and installments thereof, and interest, then remaining unpaid; and within 30 days after the county collector shall have received the general tax books, the special assessments, special taxes, or installments thereof, and interest, then remaining unpaid, shall be marked therein, and if for any reason, such application cannot be made during such month of October, it shall be made at any time not later than the 1st day of the following January.

Chapter 120, Paragraph 716 (Section 235 of the Revenue Act of 1939, as amended)

716. Proceedings by court—Form or order—Cure of error or informality

§ 235. The court shall examine the list, and if defense (specifying, in writing, the particular cause of objection) be offered by any person interested in any of the lands or lots, to the entry of judgment against them, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be: Provided, that no person shall be permitted to offer any such defense unless such writing specifying the particular cause of objection shall be accompanied by an official original or duplicate tax collector's receipt, showing that all taxes to which objection is made have been paid under protest pursuant to the provisions of section 194 of this Act; and it shall be the duty of all tax collectors to furnish such duplicate receipt without charge.

If any party objecting to any tax paid under protest is entitled to a refund of the amount, or any part thereof, so paid under protest, the court shall enter judgment accordingly. The court shall give judgment for such taxes and special assessments and penalties as shall appear to be due, and such judgment shall be considered as a several judgment against each tract or lot or part of a tract or lot, for each kind of tax or special assessment included therein; and the court shall direct the clerk to make out and enter an order for the sale of such real property

against which judgment is given, which shall be substantially in the following form:

Whereas, due notice has been given of the intended application for a judgment against such lands and lots, and no sufficient defense having been made or cause shown why judgment should not be entered against such lands and lots, for taxes (special assessments, if any), interest, penalties and costs due and unpaid thereon for the year or years herein set forth, therefore it is considered by the court that judgment be and is hereby entered against the aforesaid tract, or tracts, or lots of land, or parts of tracts or lots (as the case may be), in favor of the People of the State of Illinois, for the sum annexed to each, being the amount of taxes (and special assessments, if any), interest, penalties and costs due severally thereon; and it is ordered by the court that the said several tracts or lots of land, or so much of each of them as shall be sufficient to satisfy the amount of taxes (and special assessments, if any), interest, penalties and costs annexed to them severally, be sold as the law directs.

The order shall be signed by the judge. In all judicial proceedings of any kind, for the collection of taxes and special assessments, all amendments may be made which, by law, could be made in any personal action pending in such court, and no assessment of property or charge for any of the taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collection of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof; and any irregularity or informality in the assessment rolls or tax lists, or in any of the proceedings connected with the assessment or levy of such taxes, or any omission

or defective act of any other officer or officers connected with the assessment or levying of such taxes, may be, in the discretion of the court, corrected, supplied and made to conform to law by the court, or by the person (in the presence of the court) from whose neglect or default it was occasioned. Provided, that where separate advertisement and application for judgment and order of sale is made on account of delinquent special taxes or special assessments in all cities, villages and incorporated towns in counties containing a population exceeding 1,000,000 inhabitants by the last preceding census of the United States or of this State, and in cities, villages and incorporated towns in other counties in which the county board by resolution has extended the time in which the return, required in section 209, may be made, the procedure shall in all respects be the same as in this section prescribed, except that there shall be two separate judgments and orders for sale, one on account of delinquent special taxes and special assessments and the other on account of delinquent general taxes.

PUBLIC ACT 82-598
SENATE BILL 957

AN ACT to amend Sections 192 (a) and 194 of the "Revenue Act of 1939", filed May 17, 1939, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 192 (a) and 194 of the "Revenue Act of 1939", filed May 17, 1939, as amended, are amended to read as follows:

(Ch. 120, par. 673a) [S.H.A. ch. 120, ¶ 673a]

Sec. 192 (a). The county collector shall as provided in Section 2 of "An Act relating to certain investments of public funds by public agencies", approved July 23, 1943, as amended,[1] invest and reinvest the proceeds of any taxes paid under protest as provided in Section 194 or 195[2] in obligations of the United States Government maturing not more than 91 days after the date of purchase or may deposit such funds in savings accounts, including certificates of deposit, investment certificates or time deposit open accounts, in banks or savings and loan associations insured by the United States or other federal agency. No more than the amount so insured shall be held in any bank or savings and loan association savings account. Investments made in obligations of the United States Government shall be at then existing market price and in any event not to exceed par plus accrued interest. The cost price of such obligations and all savings accounts in banks

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[1] Chapter 85, ¶ 902.

[2] Paragraphs 675, 676 of this chapter.

Additions in text are indicated by underline; deletions by ~~strikeouts~~.

or savings and loan associations shall be considered as cash in the custody of the county collector to his successor. All earnings accruing on any such investment or bank or savings and loan association savings account shall be credited to and paid into the county corporate fund, except as provided in Section 194.

(Ch. 120, par. 675) [S.H.A. ch. 120, ¶ 675]

Sec. 194. Except as otherwise provided in Section 224.1 of this Act,[1] current taxes on real property shall be payable in 2 equal installments. The collector, when so requested by the party paying the taxes, shall receive and receipt for such taxes in installments. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes when a particular specification of the part is furnished. If the tax on the remainder of such lot or parcel of land remains unpaid, the collector shall enter such specification in his return, so that the part on which the tax remains unpaid may be clearly known. The tax may be paid on an undivided share of real estate. In such case the collector shall designate on his record upon whose undivided share the tax has been paid.

If any person desires to object pursuant to Section 235 of this Act[2] to all or any part of a real property tax for any year, for any reason other than that the real estate is not subject to taxation, he shall pay the tax installments as they become due, and each installment payment shall be accompanied by a writing, substantially in the following form:

[1] Paragraph 705.1 of this chapter.

[2] Paragraph 716 of this chapter.

Payment under protest

Vol. No. ..... Item No. ..... (as the same appear on the General Tax Bill). Original amount of tax $..... Amount of payment $..... . This payment shall be applied to the taxes of all taxing bodies ratably, subject to refund of ....% of the tax, which is objected to on the ground (here set forth ground of objection) and is, accordingly, made under protest.

Name of taxpayer .....

Address .....

The person protesting shall present to the collector 2 copies of the written protest signed by himself. The collector shall write or stamp the date of receiving the same upon the copies, and sign the same, one of which copies he shall retain and the other he shall deliver to the person making the payment under protest.

In counties having 1,000,000 or more inhabitants, and in other counties which have adopted the method provided for in Section 224.1, any such written protest, whether of all or any part of a real property tax, shall be presented to the Collector at the time of payment of the second installment of said tax and at no other time.

The person paying real estate taxes under protest shall appear in the next application for judgment and order of sale and object to the taxes in relation to which the protest is made, and upon his failure so to do, the protest shall be waived, and judgment and order of sale entered for any unpaid balance of such taxes.

When any such objection is filed in a county of fewer than 1,000,000 inhabitants, there shall also be filed a dupli-

cate copy for the use of the State's Attorney and a triplicate copy for the use of the county clerk of such county. Any such objection or amendment thereto filed in a county of fewer than 1,000,000 inhabitants shall contain on the first page thereof a listing of the tax levying units against which the objection is directed. Within 10 days thereafter the clerk of the circuit court shall deliver one copy to the State's Attorney and one copy to the county clerk, taking their receipts therefor. The county clerk shall, within 30 days from the last day for the filing of objections, notify the duly elected or appointed custodian of funds for each tax levying unit, whose tax monies may be affected by such objection, that such objection has been filed. Any amendment filed to such objection, except any amendment permitted to be made in open court during the course of a hearing on such objection, shall likewise be filed in triplicate, with the duplicate copy delivered to the State's Attorney and the triplicate copy delivered to the county clerk by the clerk of the circuit court as hereinabove provided in the case of original objections, and the State's Attorney shall within 10 days of receiving his copy of such amendment notify the duly elected or appointed custodian of funds for each tax levying unit whose tax monies may be affected by such amendment that such amendment has been filed. The State's Attorney shall also notify such custodian and the county clerk in writing of the date, time and place of any hearing before the court to be held upon such objection or amended objection not later than 4 days prior to the hearing thereon. The notices provided herein shall be by letter addressed to such custodian or the county clerk and may be mailed by regular mail, postage prepaid, postmarked within the 30 day period or the 10 day period, as the case may be, but not less than 4 days before a hearing.

In all counties, when the taxpayer appears and files objection, the court shall, after first determining that due notice, if required, has been given to the tax levying unit, hear and determine the matter according to the right of the case and enter judgment for any part of the taxes, or order a refund of any part of the taxes, so paid under protest. Appeals shall lie from such orders of the court as in other cases of objection to judgment and order of sale for taxes. Refunds shall be made by the collector in accordance with the final orders of the court, and the amount of such refunds shall be deducted from the taxes of the taxing bodies whose taxes where adjudged illegal, in the same or a subsequent year. Proceedings upon objections filed under this Section are subject to Section 194a.[3]

Where any tax is paid in full and protested as herein provided before the delinquent taxes are transcribed into the tax judgment, sale, redemption and forfeiture record, and the taxpayer appears and files objection, the collector, within such time as may be fixed by the court, shall file a transcript from the tax warrant book showing the tax, and such transcript shall be an amendment to the tax judgment, sale, redemption and forfeiture record, and the case shall proceed as if the tax had been originally transcribed therein.

In the payment of real or personal property taxes or any installment of real property taxes, the collector shall first apply such payments to interest (including interest added upon forfeiture to real property taxes) and costs, and after the payment of interest and costs such payments shall be

[3] Paragraph 675a of this chapter.

applied upon the total tax of real or personal property upon which the payments are made.

No protest shall prevent or be a cause of delay in the distribution of tax collections among the taxing bodies of any taxes collected which were not paid under protest. The collector may withhold from distribution the amounts paid under protest or ½% of the total taxes collected, whichever is less. Such amounts paid under protest and withheld from distribution shall be deposited by the collector in interest bearing accounts. If the final order of a court on the protest results in a payment to the taxpayer of all or a part of the taxes paid under protest and withheld, all or a proportional share of such interest earned during the pendency of the protest by the amount repaid to the taxpayer shall also be paid to the taxpayer. If the final order of a court on the protest results in a payment to the taxing districts of all or a part of the taxes paid under protest and withheld, the interest earned during the pendency of the protest by such taxes paid to the taxing districts shall be paid into the county treasury. The collector shall deduct from the taxes of any taxing body for any year the amount of any tax for any year held illegal by the final order of a court, and use the amount deducted to equalize the distribution.

APPROVED: September 24, 1981 EFFECTIVE: January 1, 1982

No. 82-2115

In the

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON as Trustee Under a Trust Agreement, dated March 17, 1975, and known as Trust R-1809,

Appellant,

-vs-

EDWARD J. ROSEWELL, County Treasurer and Ex-Officio County Collector of Cook County, Illinois; THOMAS C. HYNES, Assessor of Cook County, Illinois; and HARRY H. SEMROW and SEYMOUR ZABAN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois,

Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

The Appellees (hereinafter collectively referred to as "County Tax Officials") move the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of Illinois on the ground that it is manifest that the questions on which the decision of the case rests are so insubstantial as not to need further argument.

FACTS

The facts of this case are adequately discussed in the Illinois Supreme Court opinion. 93 Ill. 2d at 390-391. A brief summarization is made here for the Court's convenience.

The action involves a 1978 real estate tax assessment dispute relating to appellant's property which is located in Evanston, Illinois, and is commonly known as One American Plaza. For the 1978 tax year, which was the first year of operation of the building, the Assessor proposed an assessment of $8 million which, based on the 40% level of assessment in Cook County, indicated an opinion that the building had a fair cash market value of approximately $20 million. The appellant then persuaded the Assessor to recommend a reduction in assessment utilizing the income capitalization approach to yield an assessment of $3.4 million based on a fair value of approximately $8.5 million. At that time, however, the Assessor had already certified the Evanston tax rolls and could not change the assessment. *See* Ill. Rev. Stat. ch. 120 para. 603. The appellant filed complaints with the Board of Appeals pursuant to Ill. Rev. Stat. ch. 120 para. 594 (1), and the Assessor recommended the assessment be reduced. The complaint disclosed the construction of the building had cost approximately $17 million. It is also clear in this case that the property had been mortgaged for approximately $20 million. Commissioner Semrow testified that the appellant's evidence of value was insufficient to justify the conclusion that the assessment was excessive.

The appellant then paid the lesser amount of taxes it deemed fair and brought this action seeking injunction against the collection of the balance. At trial, the As-

sessor based on additional information withdrew the original recommendation of $3.4 million and stated that if an income approach were to be used, an assessment of $4.3 million was indicated. The Assessor testified, however, that it was not entirely clear that the income capitalization approach was the optimum method of valuation. (R. 174)

The trial and appellate court granted injunctive relief and set the assessment at $3.9 million or a fair cash value of $9.75 million.

The Illinois Supreme Court reversed on the grounds that the case did not present facts which warranted injunctive relief because the appellant had available to it an adequate remedy at law in which any and all claims against the tax could be raised. 93 Ill. 2d at 392. *See*, Ill. Rev. Stat. ch. 120 pars. 697 and 716 (referred to herein as the "objection procedure.")

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE THIS CASE PRESENTS NO SUBSTANTIAL QUESTION.

The appellant seeks review of the Illinois Supreme Court's decision which held that appellant, as an Illinois taxpayer, has an adequate legal remedy to seek redress of any claims regarding the real estate tax assessment of its property. *First National Bank of Evanston* v. *Rosewell,* 93 Ill. 2d 388, 392 (1982). *See,* Ill. Rev. Stat. ch. 120, paras. 675 and 716. The appellant's contention that the case should be reviewed here is based on the premise that the adequate remedy at law in Illinois constitutes a deprivation of due process in that it requires a taxpayer to pay the full amount of taxes under protest but provides no interest if the taxpayer obtains a refund. The appellant contends the failure to pay interest is contrary to this Court's ruling in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155, 101 S.Ct. 446 (1980). In addition, the appellant urges the Illinois Supreme Court's decision in *Shell Oil Co.* v. *Department of Revenue,* 95 Ill. 2d 541 (1983) is somehow in conflict with the decision reached in this case and should therefore be reviewed.*

An analysis of the appellant's claims in light of the applicable provisions of law and governing cases will demonstrate the lack of substance in appellant's case.

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* There is no authority for this Court to engage in appellate or certiorari review of *Shell* in this case.

The appellant argued in this case that the failure of Illinois to pay interest on a real estate tax refund rendered the Illinois legal remedy "inadequate". Both the courts of Illinois and this Court have held that the failure to pay interest does not render the Illinois remedy inadequate. *See, e.g, Rosewell* v. *La Salle National Bank*, 450 U.S. 503 (1981); *Clarendon Associates* v. *Korzen*, 56 Ill. 2d 101 (1973); *Lakefront Realty Corp.* v. *Lorenz*, 19 Ill. 2d 114 (1960). Indeed, in *Rosewell*, this Court held that interest claims were properly raised in the Illinois objection procedure. In the case at bar, the Illinois Supreme Court followed the foregoing authorities. So viewed, the appellant's argument on the interest question is really an attempt to relitigate the *Rosewell* case. This case, therefore, presents no substantial question.

Moreover, the claim that the Illinois objection procedure is violative of due process because no interest is awarded to a successful tax objector is not a question properly presented to the Court in this case for the following cogent reasons.

First, the appellant's argument assumes it would be entitled to a refund if it had pursued the legal remedy.*

The fact is that the appellant has not pursued the Illinois legal remedy and has not been refused interest on

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* The property was valued at approximately $20 million. Given the fact that the recent construction cost of the building was $17 million and the property was mortgaged for $20 million, the assumption that the property is not worth $20 million is tenuous at best. *See* American Institute of Real Estate Appraisers, *The Appraisal of Real Estate*, p. 507, 7th Ed. 1978.

a refund. The failure of the Illinois legal remedy to provide for interest on a refund cannot violate any alleged right until it is first determined that a refund is due and interest is refused. Consequently, the appellant does not have standing to raise the claim. Second, the appellant admits that the due process claim was not raised in the trial court but rather was raised for the first time in the Illinois Supreme Court. This constitutes a clear waiver under state law. *Snow* v. *Dixon*, 66 Ill. 2d 443 (1977). Third, since the appellant has not pursued the Illinois remedy, the claim is not "ripe" for adjudication since a full formulation and presentation of the claim has not been made. *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Younger* v. *Harris*, 401 U.S. 37 (1971). As held in *Rosewell* and in the case at bar, the interest question as well as any constitutional claim is properly litigated in the Illinois objection procedure.

Based on the foregoing analysis, it is manifest that the case presents no substantial question and the appeal should be dismissed.

II. IN THE ALTERNATIVE THE DECISION OF THE ILLINOIS SUPREME COURT SHOULD BE AFFIRMED.

Consideration of the result of the Illinois Supreme Court decision also discloses that it is abundantly correct and should be affirmed.

The result of the decision is that the appellant, as an Illinois taxpayer, should raise any and all claims regarding its tax liability in the forum provided in the

adequate Illinois legal remedy.* This is exactly the result achieved by this Court in *Rosewell*.

Moreover, analysis of the due process claim shows that the failure of Illinois to pay interest on a refund is not a constitutionally prohibited taking. The appellant's argument relies on *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155; 101 S. Ct. 446 (1980). A mere reading of *Webb's* in light of the facts of this case shows that it is inapposite.

The decision in *Webb's* involved a deposit of funds by a purchaser with the clerk of the court prior to the initiation of an interpleader action. The clerk deducted and retained a statutory fee from the funds and deposited the balance pursuant to a count order in an interest-bearing account. At the conclusion of the interpleader action the clerk refused to refund the earned interest.

In ruling that the retention of the earned interest was a prohibited "taking," this Court relied upon the fact that the money was "concededly private" (a concession not made here) and that interest retention could not be justified as promoting the general welfare. 101 S. Ct. at 452. Significantly, the Court also stressed that under Florida law the court clerk already had received a fee "for services rendered" in connection with accepting the interpleader fund and stated:

> We express no view as to the constitutionality of a statute that prescribes a county's retention of interest

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* The question whether the appellant may yet pursue the legal remedy regarding the subject property is not before this Court. The appellant has not yet attempted to pursue this route and the appellees have taken no position on the question.

> earned, where the interest would be the only return to the county for services it renders.

101 S. Ct. at 452.

In the present case, real estate taxes paid under protest are not "private" funds. To the contrary, the County Collector has a claim or right to the taxes even prior to the issuance of the tax bills. Ill. Rev. Stat. ch. 120, par. 697. This lien and claim of right is not affected until the court adjudicates the correctness of the assessment. *See, Morton Grove Park Dist.* v. *American National Bank,* 78 Ill. 2d 353, 364-365 (1980). This lien and claim of right thus extinguishes, *pro tempore,* the private character of tax payments until a judicially established overassessment is declared.

In addition, the requirement of payment under protest of the full amount of taxes due promotes the general welfare. It ensures that the risk of taxpayer insolvency does not shift to the county. *See, Perez* v. *Ledesma,* 401 U.S. 82, 128 (1971). Taxpayers are provided a forum for redress of tax grievances and stability in local governmental finance is promoted. *See Rosewell* v. *La Salle National Bank,* 450 U.S. 503, 528 (1981).

The Illinois Supreme Court in this case also correctly observed that there is no fee charged by the Collector as there was in *Webb's* so that the *Webb's* case was distinguishable on that ground as well. The appellant's only response to this point is that the Illinois Supreme Court's decision in *Shell Oil Co.* v. *Department of Revenue,* 95 Ill. 2d 541 (1983), conflicts with the decision reached in the case at bar.

The argument fails to provide any cogent reason why this Court should review this case. *Shell* permitted an award of interest to a retail occupation taxpayer from funds which, as in *Webb's*, were deposited in an interest bearing account pursuant to court order. *Shell* noted the general rule that even under the law applicable to retail occupation taxes interest would not generally be recoverable as a matter of course. 95 Ill. 2d at 547. *Shell* granted relief because the moneys had been paid into court and were held pursuant to court order. Significantly, there was also statutory authority to support the interest award and no provision of law authorized the retention of the interest under the circumstances of the case.

Shell has no bearing on this case. If anything, *Shell* shows that the Illinois courts will entertain claims for interest on refunds when the legal remedies are followed. So viewed, the Illinois Supreme Court in the case at bar held correctly that the appellant's claims were not properly raised in an injunctive proceeding.

CONCLUSION

The decision rendered by the Illinois Supreme Court in this case is consistent with precedent well-established both in Illinois and by this Court. No substantial or significant question is presented. Either the appeal should be dismissed or the decision of the Illinois Supreme Court should be summarily affirmed.

Respectfully submitted,

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No. 82-2115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, as Trustee under a Trust Agreement, dated March 17, 1975, and known as Trust R-1809,

Appellant,

v.

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Appellees.

On Appeal From The Supreme Court Of Illinois

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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I.

THE QUESTIONS ARE PROPERLY PRESENTED.

The county taxing officials have raised three reasons why the questions presented by the Jurisdictional Statement are not properly presented. Each reason lacks merit.

A.

The county taxing officials argue that, under state law, question 1 was not timely raised in the state proceedings. However, since the Supreme Court of Illinois actually considered and decided question 1, this Court has jurisdiction to review this case by appeal. *Orr v. Orr*, 440 U.S. 268, 274-275, 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979).

B.

The county taxing officials argue that taxpayer has no standing to raise question 1, but cite no authority. Their position is incorrect. Taxpayer has standing to challenge the constitutionality of the legal remedy because the tax bills had been issued and the collector's suit to obtain a judgment pursuant to that legal remedy was imminent. (Ill.Rev.Stat., 1979, ch. 120, par. 710). *Doe v. Jones*, 327 Ill. 387, 388, 392, 158 N.E. 793, 55 A.L.R. 303 (1927); *Cramp v. Bd. of Public Instruction*, 368 U.S. 278, 282-283, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961). Cf. 42 Am. Jur.2d, Injunctions, §187-191 and cases cited therein.

C.

The Supreme Court of Illinois affirmed the dismissal of taxpayer's federal claim and ordered the dismissal of taxpayer's state equitable action seeking prohibitory relief. Nothing remains to be done by the trial court except the ministerial act of entering the judgment directed by the Supreme Court of Illinois. Thus, the decision of the Supreme Court of Illinois is undoubtedly a final judgment or decree. *Weston v. City Council of Charleston, S.C.*, 27 U.S. 449, 463-464, 2 Pet. 449, 7 L.Ed. 481 (1829); *Madruga v. Superior Court*, 346 U.S. 556, 98 L.Ed. 290, 74 S.Ct. 298 (1954).

However, the county taxing officials raise the novel argument that taxpayer's claims are not "ripe" for adjudication, citing *Boyle v. Landry*, 401 U.S. 77, 27 L.Ed.2d 696, 91 S.Ct. 758 (1971) and *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). Reliance on those cases is misplaced since they involve the doctrine of abstention. This Court has never ruled that abstention is applicable when review by appeal is sought pursuant to 28 U.S.C. §1257. Also, abstention is never proper where the state court has already actually decided the issues in the same case and there are no unsettled questions of state law. *Orr v. Orr*, 440 U.S. 268, footnote 8 at 278, 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979).

Surely, questions 3 and 4 presented in the Jurisdictional Statement (and to which no response has been made) are completely ripe for decision by this Court. A decision not to review these substantial and unsettled questions concerning the scope of relief available in state court under 42 U.S.C. §1983 presupposes that the legal remedy, as it existed when taxpayer filed this action, was adequate and, despite the unique facts of this case, a post-deprivation remedy is constitutionally allowable.

Likewise, question 1 is ripe for decision by this Court because it was specifically ruled upon by the Supreme Court of Illinois. Taxpayer concedes that question 2 might not be ripe for decision by this Court if presented alone. However, it is joined with questions properly raised; it could not have been raised in the proceedings below; and, taxpayer has suggested, as an alternative, that remand of this case for presentation of question 2 to the Supreme Court of Illinois would be appropriate.

The questions are properly presented.

II.

REVIEW OF THIS CASE IS NOT PRECLUDED BY THIS COURT'S DECISION IN *ROSEWELL v. LA SALLE NATIONAL BANK*.

The county taxing officials argue that no substantial question is raised because this appeal merely seeks to relitigate *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 67 L.Ed.2d 464, 101 S.Ct. 1221 (1981).

In *Rosewell* this Court stated that the taxpayer there had not asserted any "federal right" to receive interest and, for that reason, this Court expressed no view on the issue. (450 U.S., at 515).

In this appeal, taxpayer claims that it has a federal right to receive earned interest. Therefore, review of this case is not precluded by this Court's decision in *Rosewell*.

Finally, taxpayer believes that misleading assertions concerning the facts in this case have been made on page 3 of the Motion to Dismiss or Affirm. Therefore, concurrent with the filing of this Brief in Opposition, taxpayer has requested that, pursuant to Rule 13.1 of this Court, the Clerk of the Supreme Court of Illinois certify pages R172-175 of the record and provide for their transmission to this Court. Taxpayer believes this small portion of the record is essential to a proper understanding of this case in light of the assertions made in the Motion to Dismiss or Affirm.

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